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APPENDICES

NO.

Supreme Court, U.S.  
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IN THE SUPREME COURT  
OF THE UNITED STATES

(October Term 1987)

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BARRY KRUPKIN, ET AL.,  
Petitioners,

- v.

DOW CHEMICAL CO., ET AL.,  
Respondents.

IN RE "AGENT ORANGE"  
PRODUCT LIABILITY LITIGATION

\*

PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
SECOND CIRCUIT

SINGLE APPENDIX

(Re: Certification of Class  
and Class Settlement)

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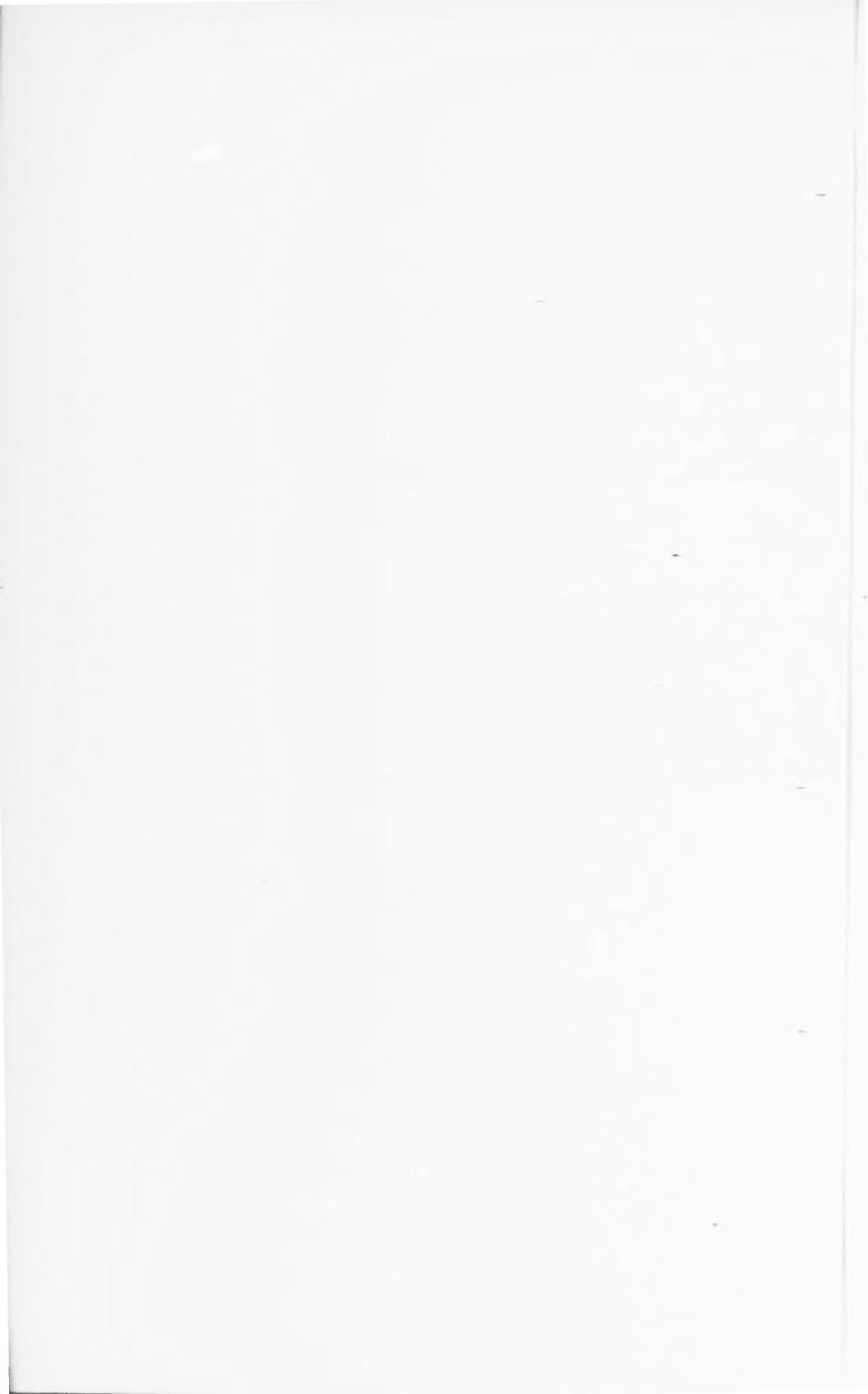
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ATTORNEYS FOR PETITIONERS



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APPENDIX

I

In re "AGENT ORANGE" PRODUCT  
LIABILITY LITIGATION,  
Michael F. RYAN, et al., Plaintiffs,

v.

DOW CHEMICAL COMPANY, et al.,  
Defendants.

United States District Court,  
E.D. New York.

May 28, 1985.

I. INTRODUCTION

On May 7, 1984, a settlement was reached in this class action by Vietnam veterans and their family members against seven chemical companies for injuries plaintiffs believed were caused by exposure of the veterans to Agent Orange and other phenoxy herbicides in Vietnam. The settlement has been found, under the circumstances, to be fair, reasonable and adequate; the reasonable fees and expenses to be paid from the settlement fund to

plaintiffs' attorneys have been determined; and final approval has been given to the settlement. See, e.g., *In re "Agent Orange" Product Liability Litigation*, 611 F.Supp. 1296 (EDNY 1985) (Memorandum, Order and Judgment dismissing chemical companies' third-party claims against the United States); 611 F.Supp. 1223 (EDNY 1985) (Memorandum, Order and Judgment dismissing the actions of 281 veterans who opted out of the class action against the chemical companies); 104 F.R.D. 559 (EDNY 1985) (Memorandum and Order lifting protective orders wth stay pending disposition of appeals); 603 F.Supp. 239 (EDNY 1985) (Memorandum, Order and Judgment dismissing plaintiffs' claims against the United States); 597 F.Supp. at 876-78(listing all previously published opinions).

The issue now posed is how to distribute the balance of the settlement

fund - some \$200 million - remaining after payment of attorney fees and expenses. There is no entirely satisfactory answer to the distribution problem. The definition of the class gives guidance only insofar as it requires two conditions for an award to any individual: (1) exposure to Agent Orange in Vietnam, and (2) a claim of injury as a result of that exposure. Because no substantial scientific evidence supports a finding of causal connection between Agent Orange exposure and any specific disease except chloracne, and because of the near impossibility of proving that any particular plaintiff's condition was caused by Agent Orange, dividing the fund among those with particular diseases is unjustified. Dividing the fund equally among all of those who might now or in the future meet the two requirements - exposure and injury - has the appeal of

simplicity, but the individual sums allocated would be too small to provide an appreciable benefit to the recipient.

A number of other suggestions are discussed below. None has as much merit as that proposed by Special Master Kenneth R. Feinberg, Esq. In an elegant solution, he suggests a combination of insurance-type compensation to give as much help as possible to individuals who, in general, are most in need of assistance, together with a foundation run by veterans with the flexibility and discretion to take care of individuals and groups most in need of help. With some slight modifications, the Special Master's recommendations are adopted. The Special Master will be reappointed to oversee implementation of the distribution plan.

The greater part of the fund will be distributed through a payment program to individual veterans and family members in

the form of death and disability benefits. another portion will be allocated to a class assistance foundation to be administered for the benefit of the class as a whole, including the spouses and children of veterans. Finally, two percent of the fund will be allocated if trusts can be established in Australia and New Zealand for disbursement to class members in those countries.

In essence, an insurance policy for death and disability during the period from 1970 to 1995 will be purchased for \$150 million covering each of an estimated 600,000 United States Vietnam veterans exposed to Agent Orange. In addition, a foundation initially funded at \$45 million will be organized to provide services to exposed veterans and their families, particularly those with children having birth defects.

Actual distribution cannot begin until

appeals are decided. The first of these appeals was filed early this year and the last of them probably will not be decided until 1986. Nevertheless, to speed disposition as much as possible, the Special Master is being directed to take all necessary steps to enter into the requisite contracts, set up the necessary organizations, and receive applications for awards so that payments can be made promptly should the appellate courts approve. Payments to members of the class necessarily will be stayed pending the final decisions on appeal.

Recovery is limited by the definition of the class certified. It consists of certain Vietnam veterans and their family members:

The plaintiff class is defined as those persons who were in the United States, New Zealand or Australian Armed Forces at any time from 1961 to 1972 who were

*injured while in or near Vietnam by exposure to Agent Orange or other phenoxy herbicides, including those composed in whole or in part of 2,4,5-trichlorophenoxy-acetic acid or containing some amount of 2,3,7,8-tetrachlorodibenzo-p-dioxin. The class also includes spouses, parents, and children of the veterans born before January 1, 1984, directly or derivatively injured as a result of the exposure.*

*In re "Agent Orange" Product Liability Litigation*, 100 F.R.D. 718, 729 (EDNY 1983), *mandamus denied*, 725 F.2d 858 (2 Cir.), *cert denied*, 104 S.Ct. 1417, 79 L.Ed.2d 743 (1984) (emphasis added). The term "Agent Orange" as used in this and earlier opinions refers to other phenoxy herbicides - Agent Orange II, Agent purple, Agent Pink and Agent Green - as well as Agent Orange. The settlement

covers the claims of all class members. See *In re "Agent Orange" Product Liability Litigation*, 597 F.Supp. 740, 862-66 (EDNY 1984) (reprinting settlement agreement).

Distribution of preliminary claim forms began in June 1984. Class members wishing to participate in distribution of the settlement fund were required to submit claims forms by the filing deadline if the injuries believed to be related to Agent orange exposure had already become manifest. Those who later learn of adverse health effects previously unknown to them are required to file claims within 120 days of acquiring that knowledge.

The original filing deadline of October 26, 1984 was extended twice at the request of various veterans groups. The final deadline required claim forms to be delivered or postmarked by January 15, 1985. Special provision was made for veterans whose names were on a list

provided by the Veterans Administration in December 1984. A postcard was mailed to each of these individuals with instructions to sign and return it if that person had not previously received a claim form; once a claim form had been mailed, that individual had 30 days to complete and return it. Similarly, a person who wrote or called requesting a claimform by January 2, 1985 was given 30 days to complete and return a claim form once one had been mailed to that individual.

To date, about 245,000 claims have been filed with the Agent Orange Computer Center, the facility that has been processing claim forms under court supervision. About 12,000 of them were filed after the applicable deadline.

A significantly higher number of claims has been received than was originally anticipated. The aggregate number of claims submitted, however, has little

bearing on the question of how many claims have any merit. Many claims appear to have been submitted because various organizations have advised veterans to file claims whether or not anything was wrong with them and whether or not any problems they may have could conceivably be related to Agent Orange exposure. See Memorandum of Agent Orange Plaintiffs' Management Committee in Opposition to Report of the Special Master Pertaining to the Disposition of the Settlement Fund, filed May 7, 1985, pp. 7, 14.

The \$180 million settlement fund has been accruing interest since the date of settlement and now totals over \$195 million. On January 7, 1985, attorney fees and expenses amounting to about \$9.3 million were awarded. This award has not been paid pending appeals. Motions for reconsideration of a number of these fee awards are presently pending before the

Magistrate. The portion of the settlement fund available for distribution now amounts to about \$185 million, a figure subject to adjustment when the final decision on reconsideration of attorney fee awards is made. A total of about \$200 million should be available for distribution to the class once appeals have been completed.

Following the public hearing on distribution held on March 5, 1985, the court received a number of submissions that required thorough review. The Agent Orange Plaintiffs' Management Committee had requested and were granted additional time to address the merits of the plan submitted by Special Master Kenneth R. Feinberg. Their comments were forwarded to the court on May 6, 1985. Individual letters from veterans organizations and members of the class received by May 15,

1985 were all considered by the court. The numerous distribution proposals, extensive testimony and other commentary on various proposals all were evaluated carefully in reaching a decision on which plan was most practicable and fair.

## II. LEGAL STANDARDS FOR FUND DISTRIBUTION

The court's responsibility for ensuring that a satisfactory and equitable distribution plan is implemented derives from the requirement that settlement of a class action have court approval. Fed.R.Civ.P. 23(e); see, e.g., *Curtiss-Wright Corp. v. Helfand*, 687 F.2d 171, 173-75 (7th Cir.1982); *Beecher v. Able*, 575 F.2d 1010, 1016 (2 Cir.1978). "Until the fund created by the settlement is actually distributed, the court retains its traditional equity powers." *Zients v. Lamorte*, 459 F.2d 628, 630 (2 Cir.1972).

The Rule 23(e) standard of fairness, adequacy, and reasonableness "applies with as much force to the review of the allocation [plan] as it does to the review of the overall settlement between plaintiffs and defendants." *In re Chicken antitrust Litigation American Poultry*, 669 F.2d 228, 238 (5 Cir. 1982). So long as there is no "abuse of discretion," the district court's decision on distribution details is binding. See, e.g., *In re Equity Funding Corp. of America Securities Litigation*, 603 F.2d 1353, 1362, 1365 (9 Cir.1979); *West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1085 (2 Cir.), cert denied sub nom, *Cotler Drugs, Inc. v. Chas. Pfizer & Co., Inc.*, 404 U.S. 871, 92 S.Ct. 81, 30 L.Ed.2d 115 (1971). The broad general powers of the court are enhanced in this case by the settlement agreement itself

granting the court "continuous jurisdiction, control and supervision" of the fund. *In re "Agent Orange" Product Liability Litigation*, 597 F.Supp. 740, 864 (EDNY 1984). See *Curtiss-Wright Corp. v. Helfand*, 687 F.2d 171, 173 (7 Cir. 1982).

This is a diversity tort class action. A class member's substantive right to recover for personal injuries arises under state law rather than federal law. *In re "Agent Orange" Product Liability Litigation*, 597 F.Supp. 740, 799-816 (EDNY 1984) (conflict of laws and statutes of limitations); 580 F.Supp. 690 (EDNY 1984) (general discussion of conflict of laws). In approving a distribution plan in such an action pursuant to rule 23(e), care must be exercised to see that the plan is consistent with substantive rights to damages governed by state law. See 28 U.S.C. Sec. 2072 (Rules Enabling Act).

Traditionally, a tort plaintiff's entitlement to damages requires a particularized showing of individual causation and injuries. Faithfulness to traditional tort rules in disbursing a class action settlement fund thus would require "the court to weigh the strengths and weaknesses of the claims of each class member against each of the settling defendants," a truly herculean task, "rendered a practical impossibility [if] \*\*\* the settling defendants agreed to and did participate only in a joint settlement wherein the breakdown of the contribution from each of the individual defendants was not disclosed." *In re Equity Funding Corp. of America Securities Litigation*, 603 F.2d 1353, 1365 (9 Cir.1979). Moreover, in the case of Agent Orange implementation of any distribution plan

based on traditional tort principles is impossible because of a virtual absence of proof of causation, financially impracticable because of administrative costs, and not feasible for other compelling reasons. See *infra* Part III.

Under such circumstances, the consensus of state law, see *In re "Agent Orange" Products Liability Litigation*, 580 F.supp. 690 (EDNY 1984), undoubtedly would permit alternative methods of disbursement to be considered in undertaking "the almost impossible task of determining the distribution of the settlement fund among the myriad claimants." *In re Equity Funding Corp. of America Securities Litigation*, 603 F.2d 1353, 1365 (9 Cir.1979).

Alternative methods of distributing a settlement fund may be premised on a rationale similar o the *cy pres* doctrine

of testamentary interpretation. See *West Virginia v. chas Pfizer & Co.*, 440 F.2d 1079, 1085-91 (2 Cir.), cert denied sub nom. *Cotler Drugs, Inc. v. Chas Pfizer & Co., Inc.* 404 U.S. 871, 92 S.Ct. 81, 30 L.Ed.2d 115 (1971); *In re Folding Carton Antitrust Litigation*, 557 F.Supp. 1091, 1108-09 (ND Ill 1983), aff'd in pertinent part, 744 F.2d 1252, 1254 (7 Cir. 1984), cert dismissed, 53 USLW 3854 (US May 17, 1985) (No. 84-1266). Since the settlement agreement does not provide for automatic revision of any portion of the settlement fund except on disapproval of the settlement, there is no basis for objecting to the mode of fund allocation among the plaintiffs on the ground that the court lacks *cy pres* authority. See *Beecher v. Able*, 575 F.2d 1010, 1016 n.3 (2 Cir. 1978) (distinguishing fluid class recovery holding of *Eisen v. Carlisle &*

*Jacquelin*, 749 F.2d 1005 (2 Cir.1973), vacated and remanded on other grounds, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974)).

### III. COMPARISON OF VARIOUS PROPOSALS FOR DISTRIBUTION

A number of general principles and specific suggestions for distribution were put forward at the 1984 Fairness Hearings. See *In re "Agent Orange" Product Liability Litigation*, 597 F.supp. 740, 858-61 (EDNY 1984). Helpful comments also were made at the March 5, 1985 hearing on proposals for a distribution plan and in many written submissions to the court. Among general criteria proposed were that a simple and easily administered benefits program should be implemented, simple eligibility criteria should be developed to the extent possible, transaction costs such as attorney and expert fees and

administrative overhead should be minimized, those veterans who most needed help should be given the most assistance, a national center for assisting Vietnam veterans should be established, and a fund should be set aside to help children with birth defects. These suggestions have been given substantial weight in developing this distribution order. The various distribution proposals submitted to the court will be described and analyzed below.

*A. Postpone Distribution Until the United States Has Accepted its Responsibility*

There is a strong body of opinion among the veterans that a considerably larger fund is required. While this view obviously has merit, no further funds are available from the defendant chemical companies. See *In re "Agent Orange" Product Liability Litigation*, 597 F.Supp.

740 (EDNY 1984) (opinion on fairness of settlement).

A strong argument has been made by many veterans that the United States should participate in the settlement. The facts developed to date strongly support the view that the government knew or should have known of the dangers involved in the use of Agent Orange and that the government made a calculated - and perhaps justifiable - choice to use the chemicals in order to save the lives of many members of the armed forces and perhaps civilians by making it easier to deal with ambushes from jungle and brush hiding places. The government has refused to discuss settlement and it cannot be held liable as the law has been interpreted. See 597 F.Supp. at 879; 603 F.Supp. 239 (EDNY 1985) (dismissing third-party actions against government).

The government should not, however, refuse to cooperate with the Special Master and others in implementation of the distribution plan. Such cooperation could include access to experts, help in obtaining an dinterpreting military records, and assistance in coordination with benefit and social service programs. The Social Security Administration and personnel of other government agencies have already been helpful in the process of fashioning a distribution plan.

By passing legislation providing for possible compensaton of veterans for Agent Orange expsoure, Congress in effect has promised to make adequate compensation avaialble should there be established at any time in the future a satisfactory scientific basis for finding a causal link between Agent Orange exposure and any medical problems from which vietnam

veterans suffer. See Veterans' Dioxin and Radiation Exposure Compensation Standards Act, PubL. 98-542, 98 Stat. 2725 (1984). The Act states that "[t]here is some evidence that chloracne, porphyria cutanea tarda, and soft tissue sarcoma are associated with exposure to certain levels of dioxin as found in some herbicides \*\*\*." *Id.* Sec. 2(5), 98 Stat. 2725. It establishes a presumption of causation for chloracne, a skin rash, and porphyria cutanea tarda (PCT), a liver disorder, if either of those diseases became manifest within one year of a veteran's departure from Vietnam. In the absence of evidence overcoming the presumption, interim death or disability benefits are payable for the period from October 1, 1984 to September 30, 1986. See *id.* Sec. 9, 98 Stat. 2732; H.R. Rep. No. 592, 98 Cong., 2d Sess. 10-11, reprinted in 1984 U.S.Code Cong. &

Ad.News 4449, 4457; Explanatory Statement of House Bill, Senate Amendment, and Compromise Amendment, 98th Cong., 2d Sess., 130 Cong.Rec. H11161 (daily ed. Oct. 3, 1984), reprinted in 1984 U.S.Code Cong & Ad.News 4470, 4477-78.

The Administrator of Veterans' Affairs will appoint a Veterans' Advisory committee on Environmental Hazards, an eight-member panel of which will evaluate scientific studies on the connection between dioxin exposure and adverse health effects. Act Sec. 6, 98 Stat. 2729-30. For diseases other than chloracne, PCT and soft tissue sarcoma, the Administrator after considering the panel's advice will determine whether or not "there is sound scientific or medical evidence" of a causal connection to exposure to dioxin-contaminated herbicides. *Id.* Sec. 5(b)(2)(B), 98 Stat. 2728. For all diseases

meeting this threshold and for chloracne, PCT and soft tissue sarcoma, the Administrator in prescribing regulations for the resolution of claims for benefits will make determinations "based on sound medical and scientific evidence" about whether service connection will be granted in the adjudication of individual cases, specifying the factors to be considered in and circumstances governing the granting of service connection. *Id.* Sec 5(b)(2)(A), (3), 98 Stat. 2728-29.

On April 22, 1985 the Veterans Administration issued proposed regulations to implement the Act. See 50 Fed. Reg. 15, 848-55 (1985) (to be codified at 38 CFR Sec. 1.17, 3.102, 3.311a-3.311b, 3.813). The rules establish a formal procedure for evaluating scientific or medical studies on the connection between dioxin exposure and adverse health effects. They also

fulfill the statutory requirement that the VA issue rules specifying whether an under what circumstances chloracne, PCT and soft tissue sarcomas will be recognized as service-connected.

Proposed section 1.17 provides that, from time to time, the Administrator will publish evaluation is of scientific or medical studies on causation in the Federal Register. It also states that the factors that will be considered in evaluating a study include (1) statistical significance and replicability of the study's findings, (2) whether the study and its findings have withstand peer review, (3) whether methodology is sufficiently described to permit replication, (4) whether the findings are applicable to veterans exposed to dioxin, and (5) the views of the appropriate panel of the Veterans' Advisory Committee on

Environmental Hazards. 50 Fed.Reg. 15,852  
(to be codified at 38 CFR Sec. 1.17).

Proposed sec. 3.311a addresses the connection between dioxin exposure in Vietnam and specified diseases. It presumes exposure for any veteran who served in Vietnam during the Vietnam era, and provides that the date of the veteran's exposure will be considered to be the date of the veteran's latest departure from Vietnam. 50 Fed.Reg. 15,853 (to be codified at 38 CFR Sec. 3.311a(4)(b)).

Service connection for resulting disability will be granted for chloracne manifested not later than three months from the date of exposure, *id.* (to be codified at 38 CFR Sec. 3.311a(4)(c)), absent a supervening cause. *Id.* (to be codified at 38 CFR sec. 3.311a(4)(3)(e)). No other diseases will be considered

service-connected, because "[s]ound scientific and medical evidence does not establish a cause and effect relationship between dioxin exposure and [any other disease]." *Id.* (to be codified at 38 CFR Sec. 3.311a(4)(d)). Service connection, however, may be granted for a disease shown to have been incurred in or (aggravated by active service. *Id.* (to be codified at 38 CFR Sec. 3.311a(4)(g)). Interim benefits will be available for chloracne or PCT that became manifest within one year after the date of the veteran's most recent departure from Vietnam, under the statutory presumption of causation. 50 Fed. Reg. 15,854-55 (to be codified at 38 CFR Sec. 3.813).

The absence of a sound scientific basis for finding causation and service connection for diseases other than chloracne under section 5 of the Act, and

the narrow scope of presumed causation for certain diseases under section 9 of the Act, suggest that few if any veterans are currently eligible for disability benefits under the Act. No cases have yet been certified as warranting a disability finding for the purpose of receiving benefits. Letter from Arvin Maskin, Trial Attorney, Torts Branch, Civil Division, United States Department of Justice, dated May 15, 1985. Should further studies reveal some link between dioxin exposure and the veterans' medical problems, the procedure set up to add diseases to the list of those presumptively considered causally connected is designed to give adequate protection to the veterans.

Unfortunately, the Act did not take into account the widespread fears of genetic and other damage to the veterans' wives and children resulting from the veterans' exposure to Agent Orange in

Vietnam. No substantial showing of causation has yet been made for this category of medical problems, but it undoubtedly would ease the tensions and fears among the veterans and their families if Congress were to expand the scope of the Act to include damage to the veterans' wives and children. Cf. *In re "Agent Orange" Product Liability Litigation*, 597 F.Supp. 740, 853-54 (1984) (discussing limited Veterans Administration benefits currently payable to spouses and children of veterans). If use of the VA as a compensation mechanism were deemed undesirable for administrative reasons, the Advisory Committee panel could report directly to Congress and direct legislative action could be taken on their findings as appropriate. Given the current state of scientific knowledge on causation, the potential cost to the

government of making such compensation available would be negligible, while the benefit in terms of a sense of security and the assurance that the government really does care would be enormous. The Special Master is directed to bring this matter of possible amendment of the Veterans' Dioxin and Radiation Exposure Compensation Standards Act to the attention of appropriate legislative and executive bodies. He shall not, however, lobby in any way on this or other matters connected with the Agent Orange litigation. Lobbying activities would be inconsistent with his judicial role.

So far as a distribution plan is concerned, it clearly is not possible to wait for the government and others to make further funds and resources available. We are dealing with a scarce resource. Many class members have immediate needs, and

much of the value of a settlement lies in the ability to make funds available promptly. the hard choices that must be made in distribution must be made by the court now.

#### B. Further Research

It is a position of some veterans that further extensive research to determine causation should be undertaken financed by the monies available form the fund. They would hold distribution in abeyance pending compton of such research. This expenditure is not warranted. The government has completed and has under way studies costing approximately \$150,000,000 There is no reason to believe that any studies under court auspices undertaken at this time would add substantially to scientific knowledge, and in the interim no class ember would recieve any benefit from the settlement. Cf. *In re Folding*

*Carton Antitrust Litigation*, 744 F.2d 1252, 1254-55 (7 Cir. 1984) (allocation of unclaimed portion of fund to research not permissible when existing efforts would be duplicated), cert dismissed, 53 USLW 3854 (US May 17, 1985) (No. 84-1266); *In re "Agent Orange" Product Liability Litigation*, 597 F.Supp. 859 (EDNY 1984) (waiting for development of perfect plan, assuming one can be devised, loses much of the value of a settlement, which makes funds available immediately). So far as research is concerned, the government has effectively assumed its obligation.

The only research for which the court will authorize funding is that "incidental to the work of the class assistance foundation. See *infra* Part V.D. Research-related services could form a valid component of the foundation's program in two limited respects. First, monitoring and

ovrsight of existing research could be funded to ensure that all research gaps are addressed, that data analysis takes into account all possibilities, and that research is performed thoroughly and efficiently. Second, if financially feasible and to the extent not addressed by other sources, limited funds might be provided for specific, applied research to develop techniques to help treat the medical problems of the class. For example, it may come to the attention of the foundation as a result of the monitoring of some of its grants that particular research is required. There would be no objection to using limited funds to "seed" such research or to seek governmental or private resources to conduct it if the probability of benefit to the class is substantial.

## C. Medical Treatment and Health

### Care Services

Many class members have suggested funding a variety of medical treatment and health care services ranging from the establishment of a hospital for Agent Orange class members to the purchase of medical and health insurance. for a number of reasons, these suggestions cannot be adopted.

The funding of a hospital for the treatment of problems believed to be related to Agent Orange exposure is impractical. Expenditure of the entire settlement fund would be required to set up an institution of any significant size. Operation costs would be very great. Even if the fund were not exhausted by capital expenditures, it soon would be by a variety of required subventions. In general, there is no shortage of hospital

beds in this country. Moreover, even if the proposed hospital were centrally located, very few class members would be able to use it. Providing good hospital care is an obligation of the Veterans Administration.

A medical insurance plan is undesirable for several reasons. First, it would essentially duplicate rather than supplement existing services. The Veterans Administration has been criticized by many class members. Nevertheless, it is obligated to provide free medical treatment to Vietnam veterans who may have been exposed to a toxic substance found in herbicides and whose health problems are not clearly attributable to other causes. See 38 U.S.C. sec. 610. In addition, many if not most class members have access to private medical insurance or are eligible for Mecicare or Medicaid.

An Agent Orange medical insurance plan would simply duplicate coverage and perhaps displace benefits provided under private insurance contracts or governmental programs. In effect, the fund would be used to benefit not veterans, but private insurers or governmental assistance programs.

Second, the fund could not afford to provide substantial medical insurance coverage. A program offering comprehensive major medical insurance would be prohibitively expensive. Comprehensive major medical coverage typically costs \$1,000-\$1,200 per person per year for a normal population. Report of the Special Master Pertaining to the disposition of the Settlement Fund, dated February 27, 1985, p. 72 n.33 ("Special Master's Report"). Multiplying this figure by the approximately 245,000 claims already filed

yields a cost of over \$245 million for one year. And this cost does not take into consideration the fact that the claimants are a self-selected population, presumably including many with severe medical problems, so that premiums would have to be much higher than for an average population.

A catastrophic health insurance plan also would be very expensive. For example, catastrophic medical coverage, with a \$100,000 deductible per year, costs about \$100 per year per person for a normal population. Special Master's Report, p. 73 n.34. Doubled for a self-selected population with severe medical problems, and multiplied by 245,000 claimants, the cost would total \$49 million per year. Provision of full coverage for preexisting medical conditions would be even more expensive. such a plan might be affordable

for a few years as the sole program offered by the fund, but it would only benefit those claimants who are relatively well-off. Claimants with severe, long-term illnesses who do not have substantial financial resources or insurance would be unable to pay the costs needed to trigger catastrophic coverage. Such claimants instead would probably receive assistance from various governmental programs. thus, for the most needy claimants, catastrophic health insurance would provide no additional benefit. Such a program clearly is an undesirable use of the fund.

A fixed-term hospital indemnity insurance plan would be relatively easy to administer and could be made affordable by limiting the total indemnity for each claimant and including a large deductible. But payments would not be high enough to compensate significantly for medical cost.

A hospitalization payment moreover would target settlement funds toward claimants who are not necessarily the most sick, the most disabled, or the most in need. The indemnity plan also might provide an incentive to extend hospitalization unnecessarily.

*D. High Compensation for Specific Diseases*

The Agent Orange Plaintiffs' Management Committee ("PMC") has proposed that a large group of specified diseases be compensated if exposure to dioxin-contaminated Agent Orange is shown. These diseases are suspected of being associated with dioxin exposure in laboratory studies or industrial settings. This proposal is essentially a tort-based compensation scheme, based upon an assumption of a causal connection between Agent Orange exposure and a given disease. It requires

claimants to submit substantial medical, diagnostic and other proof.

The disease proposed to be compensated include chloracne; peripheral and central neuropathy; various liver disorders including cirrhosis, chronic hepatitis and porphyria cutanea tarda; gastrointestinal conditions; hematological, endocrinial and metabolic problems; all benign and malignant tumors; and birth defects and miscarriages. See Plaintiffs' Preliminary Plan for Allocation and Distribution of Settlement Fund, filed November 26, 1984, pp. 9-13. the PMC's proposal also suggests making payment for some additional medical problems that "seem to have been reported in the literature as possibly accompanying Agent Orange exposure." *Id.* at 13. These allegedly Agent Orange-related problems include arthritis, photophobia, diarrhea, heart burn and abdominal pain. *Id.*

Each claimant who could show that he or she suffered from one or more of these medical conditions would be entitled to be considered for a benefit payment. Each claim would be discounted to reflect the legal problems with the plaintiffs' case. An "individual discount factor" also would be applied to each award to reflect "individual causation risks" - that is, the factual problems that would have arisen in proving each individual class member's claim in court. The method of calculating the "individual discount factor" is not clear, but it would take into account such factors as "exposure to Agent Orange; exposure to dioxin; levels of exposure to Agent Orange and/or dioxin; individual medical history; family medical history; lifestyle considerations; various confounding factors; specific causation; proximate causation; and damages." *Id.* at

14. After legal and factual discounts had been made, each award would be increased or decreased based on other criteria specific to each claimant, including availability of collateral sources benefits and number of dependents. *Id.* at 15.

The PMC's plan suffers from a number of serious defects. Based on the information presently available, no substantial evidence of causality exists as between dioxin-contaminated Agent Orange exposure and any given disease or medical problem, with the exception of chloracne - and chloracne alone should not be compensated according to a spokesman for the PMC. See, e.g., *In re "Agent Orange" Product Liability Litigation*, 611 F.Supp. 1285, 1287 (EDNY 1985); 611 F.Supp. 1223, 1260 (EDNY 1985); 603 F.Supp. 239, 245-47 (EDNY 1985); 597 F.Supp. 740, 777-95 (EDNY 1984); H.R.Rep. No. 592, 98th Cong. 2d

Sess 5, 7, reprinted in 1984 U.S.Code Cong. & Ad.News 4449, 4451, 4453; Transcript of March 5, 1985 Hearing, p. 182 (testimony of David Dean, Esq.). Any list of diseases such as that used in the PMC's plan would certainly be open to criticism as arbitrary and lacking in scientific foundation. Moreover, "[t]here is a strong likelihood that even if some causal link could be established between Agent Orange and the diseases from which plaintiffs claim they are suffering, it would be impossible in most cases to identify the individual class members who were injured by Agent Orange." *In re "Agent Orange" Product Liability Litigation*, 597 F.Supp. at 842. Great controversy would attend the determinations that would have to be made about whether individual claimants' diseases were "caused by" Agent Orange

exposure or would have occurred as part of the normal background incidence of disease in the general population.

Given the lack of scientific basis for general causation and the significant uncertainties involved in proof of individual causation - that is, the indeterminate plaintiff problem - it cannot now be established with any appropriate degree of probability that any individuals who suffer from the diseases listed in the PMC's plan incurred them as a result of Agent Orange exposure, or that these diseases are more likely than others to be causally related.

It is significant that the PMC has never been able to estimate the number of cases of each of the diseases for which it would compensate. Nor has it been able to show any evidence that the incidence of the disease among Vietnam veterans is greater

than among a like population of nonveterans. See *In re "Agent Orange" Product Liability Litigation*, 611 F.Supp. 1223, 1231 (EDNY 1985) (analysis of epidemiological data); 597 F.Supp. 740, 775-95 (EDNY 1984).

Necessarily, the contemplated inquiry would involve a great deal of work by attorneys, doctors and claims administrators. Claimants would have to assemble extensive evidence including sophisticated medical tests to prove specific diseases. Such a requirement would be burdensome, expensive and emotionally trying for the claimants. The transaction costs of such a distribution plan would be substantial.

The cost of establishing the PMC's "individual discount factor" could be enormous for both the fund and the claimant, depending on the degree to which

the PMC would insist on proof of causation for each individual claimant. Even if a categorical discount factor were established for each disease based on probability of causal connection - a determination that would be speculative at best in light of presently available scientific evidence - many variables unique to each individual would have to be documented and accounted for, all at substantial costs to all concerned.

No comprehensive estimates of the administrative costs to the fund and the costs to individual claimants of producing the requisite medical proof and other documentation has been provided by the PMC. It has been estimated that such a plan might costs as much as \$800 to \$1,000 pr claim. See Special Master's Report, pp. 71 n.32, 343. the PMC recently provided a one page estimate of the cost of running a

claims facility. See Memorandum of Agent Orange Plaintiffs' management Committee In Oppostion to Report of the Special Master Pertaining to the Dispositn of the Settlement Fund, app., filed May 7, 1985. The underlying assumptions and other bases for the figures provided are not explained. The figures appear to be low for the type and degree of claims processing required by the PMC's plan. Compare *id.* with Special Master's Report, pp. 53-54. Moreover, no estimates of the aggregate transaction costs of the PMC's plan are given.

A probable result of implementing this plan would be that too great a share of the fund would go to lawyers and medical experts ina vain effort to capture a will-o-the-wisp causal connection that simply cannot be established at this time. Moreover, a handful of veterans might get

large recoveries, while the vast majority would get nothing, all on the basis of controversial and speculative causal distinctions. This kind of lottery is inequitable and inappropriate.

The PMC's plan could be modified to eliminate much of the administrative costs and costs to the claimants. The list of compensable medical conditions could be limited to a small number of relatively rare diseases that might be caused by dioxin exposure, diseases that are uncommon in the general population and easily diagnosed. Such a plan would have the seeming virtue of addressing a common, albeit mistaken perception of causality held by even educated laypersons: Because the listed diseases would be unusual, a claimant suffering from one of them might well believe that his or her condition was unique in the general population and that

its cause must be related to the veteran's special experience in Vietnam.

In fact, based on currently available scientific evidence, there is no reason to believe that the incidence of any unusual physical problem is greater among those exposed to Agent orange than among any similar cohort of the unexposed. The number of cases of these diseases among class members could be estimated fairly accurately for past and future years. See, e.g., *In re "Agent Orange" Product Liability Litigation*, 597 F.Supp. 740, 786 (EDNY 1984) (chart showing cumulative expected number of deaths broken down by cause); 611 F.Supp. 1223, 1251 (EDNY 1985) (mortality caused by hepatitis). Class members suffering from such diseases could be ascertained by medical examination. Exposure determinations would be no more difficult than under any other plan. See

*infra* Part IV.D. Detailed inquiry into "individual discount factors" could be eliminated. Award grids based on severity could readily be devised. The number of awards would be no more than a few thousand.

Such a plan would result in average recoveries of several hundred thousand dollars with relatively low aggregate transaction costs. The same fundamental difficulty associated with any tort-based compensation scheme, however, would persist: No factual basis exists for choosing or excluding any disease, since causation cannot be shown for either individual claimants or individual diseases with any appropriate degree of probability. The choice of diseases and hence persons to be compensated is essentially arbitrary.

Approval of the PMC plan in any form

would be inconsistent with the court's responsibility to the class under Rule 23(e) to provide for an equitable allocation of the settlement fund. See, e.g., *Curtiss-Wright Corp. v. Helfand*, 687 F.2d 171, 174-75 (7 Cir. 1982); *In re Equity Funding Corp. of America Securities Litigation*, 603 F.2d 1353, 1363, 1365 (9 Cir. 1979); *Beecher v. Able*, 575 F.2d 1010, 1016 (2 Cir. 1978); *Zients v. Lamorte*, 459 F.2d 628, 630 (2 Cir. 1972); *In re Folding Carton Antitrust Litigation*, 557 F.Supp. 1091, 1108-09 (ND Ill. 1983), aff'd in pertinent part, 744 F.2d 1252, 1254-55 (7 Cir. 1984), cert. dismissed, 53 U.S.L.W. 3854 (U.S. May 17, 1985) (No. 84-1266).

#### **E. Death and Disability Payment**

*Program and Class Assistance Foundation.*

A distribution plan for a settlement in a tort class action should as far as

possible reflect the traditional tort law principle that individuals will receive monetary compensation for their injuries. See *supra* Part II. the common law generally holds that money damages are a preferred remedy. Many class members apparently have assumed that the distribution would be based on this premise. Accordingly, a major portion of the settlement fund should be distributed in the form of individual awards if at all possible.

To be both practicable and fair, a program of individual benefits must minimize transaction costs, be relatively easy to administer and involve relatively simple, understandable and objective eligibility criteria, while maximizing protection of those said to have suffered as a result of exposure to dioxin-contaminated Agent Orange. The presently

available evidence of causation is far too speculative to serve as the primary basis for a distribution plan, although exposure must be used as an eligibility criterion because of the class definition.

The only realistic means of proceeding with distribution that sufficiently addresses these concerns is embodied in the Special Master's Report. Payments will be made for death and long-term total disability among veterans. See *infra* Part IV. Three-quarters of the settlement fund, or \$150 million, will be set aside for this program, which will be administered by an insurance company or other appropriate disbursing institution or institutions, subject to court supervision. Only those exposed will be eligible.

Under this plan only totally disabled veterans and the surviving spouses or

children of deceased veterans will receive individual cash awards. The class as a whole, however, will benefit significantly in other ways. As discussed *infra* Part V, about one-quarter of the settlement fund, or some \$45 million, will be turned over to a class assistance foundation. The foundation will fund services on behalf of the class as a whole, including aid to children of veterans and their families in coping with birth defects. The foundations work will provide useful and meaningful benefits to those class members not eligible for direct individual awards. About 2.0% of the fund, or \$4 million, will be available to be administered separately for the benefit of Australian and New Zealand claimants. See *infra* Part VI.

Given "the manifest inadequacy of the alternative solutions that have been

proposed," *In re Folding Carton Antitrust Litigation*, 557 F.Supp. 1091, 1109 (ND Ill 1983), aff'd in pertinent part, 744 F.2d 1252, 1254 (7 Cir. 1984), cert. dismissed, 53 USLW 3854 (US May 17, 1985) (No. 84-1266), this plan provides the only reasonable formula for distribution. See *id.*; *IN re Corrugated Container Antitrust Litigation*, 659 F.2d 1322, 1328-29 (5 Cir. 1981), cert. denied, 456 U.S. 998, 102 S.Ct. 2283, 73 L.Ed.2d 1294 (1982); *Detroit v. Grinnell Corp.*, 356 F.Supp. 1380, 1388-89 (SDNY 1972) (under across-the-board settlement distribution, "some claimants will receive less than they are entitled to, as a percentage of actual damage suffered, while others receive more," but "the formula adopted is the only realistic one" available), aff'd in pertinent part, 495 F.2d 448 (2 Cir. 1974); *supra* Part II.

#### IV. PAYMENTS FOR DEATH AND TOTAL DISABILITY OF EXPOSED VETERANS

Under the payment program, individual awards will be made only to exposed veterans who suffer from long-term total disability and to the surviving spouses or children of exposed veterans who have died. A number of reasons exist for channeling individual compensation payments to class members in these categories.

First, the settlement fund, though large in absolute terms, is not sufficient to satisfy the claimed losses of every class member. An "equitable allocation of the large settlement fund [must be made] among the even larger claims of the various class members." *In re Equity Funding Corp. of America Securities Litigation*, 603 F.2d 1353, 1363 (9 Cir.

1979). although a meaningful individual cash award cannot be paid to evry claimant, a class assistance forundation will be created to fund services to help meet the needs of the entire class. Every class member will be eligible to benefit from this aspect of the distribution plan.

See *infra* Part V.

Second, however slight the suggestion of a casual connection between the veterans' medical problems and Agent Orange exposure, even less evidence supports the existence of an association between birth defects and exposure of the father to Agent Orange in Vietnam. See *In re "Agent Orange" Product Liability Litigation*, 597 F.supp. 740, 777-95 (EDNY 1984). This distinction does not imply that the miscarriage and birth defect claims were frivolous: If the spouses and children of the veterans were "completely

without any colorable legal claims against defendants, it would [be] an abuse of the court's discretion to allow them to share in the settlement fund." *In re Chicken Antitrust Litigation American Poultry*, 669 F.2d 228, 238 (5 Cir. 1982). Yet, if one set of claims had a greater likelihood of ultimate success than another set of claims, it is appropriate to weigh "distribution of the settlement \*\*\* in favor of plaintiffs whose claims comprise the set" that was more likely to succeed. *In re Corrugated Container Antitrust Litigation*, 643 F.2d 195, 220 (5 Cir. 1981), cert. denied, 456 U.S. 998, 102 S.Ct. 2283, 73 L.Ed.2d 1294 (1982). See also *In re Equity Funding Corp. of America Securities Litigation*, 603 F.2d 1353, 1364-66 (9 Cir.1979); *In re Investors Funding Corp. of New York Securities Litigation*, 9 BR 962, 964 (SDNY 1981);

*Dunn v. HK Porter Co. Inc.* 78 FRD 50, 53-54 (ED Pa 1978); cf. *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1148 (11 Cir. 1983) ("there is no rule that settlements benefit all class members equally" and "higher allocations to certain parties [may be] rationally based on legitimate considerations").

Third, the plan targets for benefits those veterans who have suffered the most severe injuries. Limiting the program to death and total disability benefits without requiring proof of a specific disease or also minimizes transaction costs, which would almost certainly be overwhelming if any of the other individual award proposals submitted to the court were implemented. See, e.g., *supra* Part III.D. Proof of eligibility will be relatively simple and will not impose on the applicant the enormous burdens of

producing volumes of medical records and paying expensive medical and legal fees for complicated processing and testing. An outside contractor such as an insurance company has the necessary skills and experience and can process such claims at minimum cost to the fund, particularly because relatively little documentation and handling will be needed. Creation of a costly new claims-processing bureaucracy, which would devour money that should go to class members, thus is avoided. "The proposed method of distribution will maximize the value of the recovery actually received by the class." *Ohio Public Interest Campaign v. Fisher Foods, Inc.*, 546 F.Supp. 1, 11 (ND Ohio 1982).

Finally, this plan "obviates[s] the necessity for particularized proof" and is "a fair response to the particular difficulties that this class would have in

gathering and presenting evidence of damages." *In re Chicken Antitrust Litigation American Poultry*, 669 F.2d 228, 240 & n.20 (5 Cir. 1982). See also *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 260-63 (5 Cir. 1974), cert denied, 439 U.S. 1115, 99 S.Ct. 1020, 59 L.Ed.2d 74 (1979); *Women's Committee for Equal Employment Opportunity v. National Broadcasting Co.*, 76 FRD 173, 178-79 (SDNY 1977).

In distributing the settlement fund, every possible effort should be undertaken to alleviate the suffering of men, women and children in the class. But compassion, though heartfelt, must be tempered with a down-to-earth sense of what can and what cannot be done. The needs of the class must be weighed against the realities of what can be accomplished given the amount of money available, the danger that

administrative, medical and legal costs will bankrupt the fund, and the premise that if anyone was injured by Agent Orange it was the veterans who were directly exposed. Attainment of a just result requires that a balance be struck among "competing notions of reasonableness," in favor of the veterans themselves. *In re Corrugated Container Antitrust Litigation*, 659 F.2d 1322, 1325 (5 Cir. 1981), cert denied, 456 U.S. 998, 102 S.Ct. 2283, 73 L.Ed.2d 1294 (1982). The choices are difficult, but they must be made.

#### *A. Compensable Death or Disability*

Awards will be made for the death or total disability of a veteran. All deaths and total disabilities will be compensable, regardless of what disease was the cause, unless predominantly caused by trauma, whether or not self-inflicted. All veteran claimants who filed a claim will receive a notice confirming that they or their eligible survivors may file for compensation upon proof of exposure if death or total disability occurs before the expiration of the payment program. See *infra* Part VII.A.1.

The reasons for limiting compensation to death and total disability have already been stated. The exclusion of traumatic injuries rests on different grounds. the causal connection between Agent Orange exposure and specific health conditions is too speculative to serve as a basis for distribution, but injuries and deaths nevertheless may be excluded as not

compensable if they are manifestly unrelated to Agent Orange exposure - for example, those incurred in automobile accidents, homicides, suicides and war wounds. Given that a relatively limited fund must be distributed among a large number of potentially eligible claimants, it is reasonable and equitable to exclude those claims that are unquestionably unrelated to Agent Orange exposure in Vietnam.

Denial of compensation for all deaths or disabilities resulting from traumatic injuries will eliminate the most prevalent causes of death or disability that are clearly unrelated. It is reasonable to make self-inflicted injuries or suicides ineligible for payment as well, notwithstanding the theoretical possibility that Agent Orange might have contributed in some way to the depression that induced

the injury. A rule that holds veterans responsible for self-inflicted harm will counteract any incentive toward suicide that provision of a death benefit from the fund to a veteran's eligible survivors might unintentionally create.

A rule that excludes traumatic, accidental and self-inflicted injuries will be simple to administer. They are relatively easy to define and determine. Aside from injuries in these categories, all others will be compensable. Few medical conditions are uncontroversially unrelated to Agent Orange exposure. A determination of whether one of these conditions caused a particular veteran's death or disability would require complex procedures that would be far too costly and time-consuming.

#### *B. Determining Total Disability*

An objective test for disability is

needed that will provide clear, easily administrable guidelines. The enormous expense and time required for individual adjudication hearings must be avoided.

Determinations of long-term total disability will be based on the definition of disability found in the Social Security Act. 42 U.S.C. sec. 301-1397f. Sec. 223 of the Act defines "disability" as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. sec. 423(d)(1) (A).

Use of the Social Security Act definition of "disability" has a number of advantages. First, it would be relatively easy to apply given the extensive

guidelines and precedents already developed under the Social Security program. Second, claimants are likely to be familiar, at least in general, with the elements of disability under this definition. Third, it would provide a cost-effective and easily administered eligibility screen. Since a similar definition of disability is found in many insurance policies, claims processing facilities are already equipped to apply such a definition efficiently and consistently. Fourth, and perhaps most important, the payment program could minimize some administrative costs by accepting Social Security determinations of disability as evidence of eligibility for veterans who are already receiving disability benefits.

Because reviewing medical evidence to determine whether an individual is disabled involves administrative costs, the payment program to the extent possible

will rely on disability determinations made by the Social Security Administration. Any veteran claimant certified as disabled by the Social Security Administration will be considered disabled for purposes of the payment program, unless the disability was predominantly caused by a traumatic, accidental or self-inflicted injury.

It was recommended by the Special Master that claimants who have not applied for Social Security disability benefits, and who would be eligible for payments under either the Supplemental Security Income (SSI) means test or the Social Security employment test, be required to apply for Social Security and exhaust all appeals within the agency before their application under the payment program would be processed. Special Master's Report, pp. 74-77. Under the Special

Master's proposal, once a veteran had received a final ruling from the agency, he would be entitled to an evaluation of disability by the program, if that ruling were unfavorable.

There is considerable merit to this suggestion. Requiring claimants to apply for Social Security as a prerequisite to independent determination under the payment program would result in significant savings in administrative costs to the fund. This requirement, however, would cause substantial delay in disbursing payment to some claimants, even though the veteran would only need to exhaust his or her appeals within the agency.

In addition, the savings to the fund do not justify burdening the Social Security system with the screening costs of this Agent Orange litigation. The court takes

judicial notice of the fact that the administrative agency is already considerably strained. Placing additional stresses on they process to aid private litigants is arguably against public policy. In any event, it is unwise and this requirement is rejected.

In the absence of a finding of disability under the Social Security administratie process, a claimant will have the right to apply to the disbursing agency for compensation. This right shall exist even if the claimant has applied and been rejected or is awaiting a Social Security disability ruling.

Claimants will be required to submit medical evidence, including records, diagnosis, and test results, similar to that required by the Social Security Administration. In determining whether a veteran claimant is eligible for a

disability award, the payment program will take into account, as evidence, a Social Security determination that the veteran is not disabled, or certifications of disability from other entities such as the Veterans Administration or private insurers.

*C. Proof of Death and Eligible*

*Survivorship*

A death certificate ordinarily will be sufficient proof of death. If the certificate does not adequately state the cause of death, further documentation such as medical and hospital records may be required by the disbursing agency to demonstrate that death was not predominantly traumatic, accidental or self-inflicted.

The claimant will be required to establish the deceased's status as a class member veteran and confirm the existence

of at least one eligible survivor - a spouse married to the veteran at the time of death or a dependent child at time of death. No death benefit will be paid if no such eligible survivor is living at the time of application for an award, see *infra* Parts IV.H and V.A, even if the survivor was alive when the intial claim form was filed. If there is a surviving spouse, the death award will be paid to her. If there is no surviving spouse, the death award will be divided equally among the dependent children. If death of a claimant occurs after application but before the award is made, it will go to his or her estate.

Proof of eligible survivorship will be the responsibility of the claimant. Because the name of a surviving spouse is generally listed on a death certificate, verification of eligibility for a spouse

will be straightforward in most instances. The claimant must sign a certificate of dependency for each dependent child. Documentary evidence will be to establish a child's dependent status. Such evidence may include a birth certificate, an adoption order, or a child support order issued by a court.

Use of a dependency test to determine whether surviving children should receive death benefits will to some extent help preserve the fund for the most needy claimants. A dependency test also is consistent with the objective of maximizing benefits to the younger veterans because they are more likely to have dependent children. The increase in administrative costs if any will not be significant.

#### D. Exposure

Claimants will be required to

demonstrate exposure to Agent Orange or other phenoxy herbicides during military service in or near Vietnam. Exposure is a legitimate and necessary eligibility criterion because it is embodied in the class definition. See *In re "Agent Orange" Product Liability Litigation*, 100 FRD 718, 729 (EDNY 1983), *mandamus denied*, 725 F.2d 858 (2 Cir., cert denied, 104 S.Ct. 1417, 79 L.Ed.2d 743 (1984)).

The Special Master's Report recommended restriction of eligibility to the 50 percent of veterans most heavily exposed to Agent Orange in Vietnam, on the grounds that "scientists do agree that the possibility of adverse health effects increases as the amount of exposure increases." Special Master's Report, p. 79 (emphais in original). such a restriction would maximize the individual award to each claimant. The Special Master's Report

also discussed a graduated payment approach, under which "veterans could be divided into three tiers, depending on whether they received low, moderate or high levels of exposure relative to the other veterans." *Id.* at 80. The Special Master favored the 50-percent approach as being easier to administer and allowing the maximum payment to be made to a large number of claimants. Less highly exposed claimants under the Special Master's plan would receive special consideration in the operation of the class assistance foundation. *Id.* at 81-83.

Objections have been raised to use of either of the exposure options outlined by the Special Master on the ground that it would be divisive, causing widespread dissension among class members. See, e.g., Comments of Vietnam Veterans of America on Plans Pertaining to the

Disposition of the Settlement Fund, pp. 7-10, filed April 10, 1985 ("Comments of VVA"). VVA, although generally supporting the Special Master's plan, opposes making the recommended exposure-based distinctions for two reasons. First, a strong correlation between adverse health effects and degree of exposure should be shown before such a criterion is used in deciding how to allocate the fund. No consensus among scientific experts exists on this point; according to VVA "the scientific evidence is not advanced enough to be confident that there is a strong correlation between degree of exposure and the possibility of injury." *Id.* at 8. Second, VVA states that "[g]iven the exposure information currently available, one cannot place great confidence in the accuracy of determinations on degree of exposure." *Id.*

The points made by VVA and others on the use of a graduated exposure criterion have merit. The Special Master's recommended methodology is based on a fundamental theory of toxicology concerning the dose-response relationship of toxic substances. That theory holds that the greater the exposure, the greater the toxic response. See Special Master's Report, p. 362. So far as is known, all toxic substances act with this dose-response relationship. *Id.* at 371. The theory also has intuitive appeal: If A repeatedly strikes B, B probably is hurt more than if struck only once. But it is possible that - assuming some validity to the theory of causality - individuals could vary greatly in their susceptibility to dioxin-contaminated Agent Orange exposure. Some might not experience adverse health effects though exposed to high levels of

dioxin, while others might fall ill after exposure to relatively low levels. Comments of VVA, p. 8. That is, C, who is struck once, may be injured more seriously than is B, who is struck ten times.

The problems associated wth proving degree of exposure and correlating degree of exposure with probability of injury compounds the enormous difficulty of proving causation generally. As already noted, causality is too speculative a basis for distribution. Smilarly, the court's duty to ensure an equitable allocation and the desirability of minimizing discord witin the class where possible, favor rejection of a graduated exposure factor that lacks a strong empirical basis.

On balance, these concerns outweigh the consideratons on which the Special Master relied. Claimants accordingly will be

required to demonstrate exposure, but degree of exposure will not be considered in making individual awards.

Some substantial showing of exposure, however, must be made to ensure tha only class members who were exposed receive payment. Exposure is a jurisdictional requirement for class membership. A presumption that all claimants were exposed is not workable. This presumption alternative would reduce the maximum possible payment level because of the increase in otherwise eligible claims. That result would be unfair to a truly exposed class member whose award otherwise would be higher. thus a presumption of exposure of all Vietnam veterans similar to that employed by the Veterans Administration, see 50 Fed.Reg. 15,853 (1985) (to be codified at 38 CFR sec. 3.311a(4)(b)), cannot be used in

connection with the payment program.

A self-reporting method of determining exposure raises similar problems. Such an approach would be an unreliable index of exposure if used alone:

During the Vietnam war, large areas of land were defoliated for reasons completely unrelated to the use of herbicides. Bombing, shelling, constant resettlement, clearing of forests, and agricultural practices all left their mark. Consequently, a veteran could understandably but erroneously assume contact with Agent Orange because he spent time in an area that was defoliated due to some other cause. Thus, a self-reporting system will not effectively screen claimants for exposure.

Special Master's Report, p. 85. However honest the claimants might be, the number

of otherwise eligible claims probably would increase in the absence of any objective check on the claimants' assertions of exposure. In addition, dishonest claims could not be screened out. Both results would be unfair to the truly exposed class member who otherwise would receive a higher award. The need to ensure an equitable allocation of the fund requires a greater showing of exposure.

Claimants could be required to submit military records demonstrating a likelihood of exposure. Such records could be useful in corroborating other information on exposure. They are, however, too cumbersome, incomplete and lacking in uniformity to serve as the sole basis for exposure determination, or even as the sole adjunct to self-reporting if other alternatives are available.

Under the Special Master's recommendations, a veteran who performed a job involving direct handling or application of Agent Orange, such as backpack spraying, would be deemed exposed. Other veterans would be processed under an objective computerized exposure evaluation system:

The methodology would call for complex calculations based on information reading a veteran's service location and on information on spraying operations obtained from the HERBS tape. The HERBS tape is a computerized record of individual herbicide dissemination missions in Vietnam, which was prepared from log books maintained at U.S. military headquarters in Saigon. The HERBS tape contains precise information on the location of spray missions, and both

the type and quantity of herbicide used.

Special Master's Report, p. 86 (footnote omitted).

The HERBS tape does not contain a complete record of herbicide spraying in Vietnam. At present, it accounts for neither pre-1965 aerial spraying nor nonaerial spraying. *Id.* at 95. Agent Orange itself, of course, did not come into use until early 1965, but other phenoxy herbicides had been used earlier.

*In re "Agent Orange" Product Liability Litigation*, 597 F.Supp. 740, 775-76 (EDNY 1984). The National Academy of Sciences nevertheless has estimated that the HERBS tape covers about 86 percent of herbicide use in Vietnam, and updated information may become available in the future. Special Master's Report, p. 95 & n.42. The Academy has concluded that the HERBS tape

is a reliable record of herbicide operations. *Id.* at 86 n.41.

The HERBS tape thus can serve as a reasonable starting point for exposure determination in conjunction with military records and claimants' affidavits asserting exposure. Accordingly, the Special Master's recommendation to this extent is adopted. In processing claims, two basic steps will be followed.

First, a questionnaire will be sent to all claimants. In addition to providing information concerning death or disability, each claimant will be asked to indicate the dates and locations of the veteran's Vietnam service. If certain veterans or their surviving families cannot recall this data, the institution administering the payment program insofar as possible will help such claimants and evaluate information about the veterans'

service history. Such assistance might be provided through class assistance foundation. See *infra* Part VII.A.5

The questionnaire also will ask whether the veteran held a job in or near Vietnam involving direct handling or application of Agent Orange. It will include an authorization to obtain military records to confirm the claimant's statements.

Second, the questionnaire data will be analyzed by objective criteria. The following test will be used:

(1) Any veteran who held a job involving direct handling or application of Agent Orange will be considered exposed. This category includes backpack sprayers; sprayers on airplanes, helicopters or boats; and loaders or handlers of spraying equipment. Military records will be used to confirm claims in this category.

(2) All other claims will be evaluated under a computerized process that will compare the veteran's location data with the HERBS tape data to determine the correlation, if any, between the veteran's whereabouts in Vietnam and the location of spraying missions.

Exposure to Agent Orange residues from past spraying as well as to contemporaneous Agent Orange spraying will be considered in making this evaluation, accounting for the possibility that a veteran might have been exposed to Agent Orange not only through his presence in an area during spraying, but also by walking, sleeping or drinking contaminated groundwater in or near a contaminated area will after spraying. But because degree of exposure will not be considered in making awards, and because exposure or its absence will be the central criterion, the

Special Master's recommended evaluation methodology must be modified. The following criteria will be used in determining whether or not a veteran was exposed to Agent Orange for purposes of making awards from the settlement fund.

First, a veteran who was present in a sprayed area when the spraying occurred will be considered exposed. Second, some temporal and geographic limits must be set to determine whether a veteran who was in a location near a sprayed area at or subsequent to the time of spraying will be considered exposed. Because location data has not yet been submitted for the veterans comprising the claims population, the time and place parameters to be used to determine exposure for fund distribution purposes cannot be established with certainty at this time. Nevertheless, some limits will have to be

determined if the exposure requirement is to have any meaning. In order to give preliminary guidance in structuring the payment program, some tentative requirements will be needed. Preliminary and final time and place parameters will be subject to court approval on recommendation of the Special Master or disbursing agency in light of the nature and quality of the data subsequently submitted by claimants.

Because the HERBS tape does not account for all exposures, an appeal process will be available to supplement HERBS tape determinations. Veterans who claim exposure despite a contrary exposure index finding could obtain further consideration of their claims, ordinarily on a written record, through an appeal to an independent board of review. See *infra* Part IV.H.4. The board of review will

consider the veteran's military records and any other documentation submitted by the veteran in rendering a decision.

#### E. Payment Program Time Limits

Only those who file timely claim forms will be considered for individual awards. See the filing deadline requirements outlined *supra* Part I.

Of the approximately 245,000 claims received as of the date of this opinion, about 12,000 were filed late. The most common reason given for the failure to meet the filing deadline is lack of knowledge of (1) the lawsuit, (2) the need to file a claim, or (3) the deadline itself. The court has the power to accept late claims in the exercise of its equitable discretion. See, e.g., *In re Gypsum Antitrust Cases*, 565 F.2d 1123, 1128 (9 Cir.1977); *Zients v. Lamorte*, 459 F.2d 628, 630-31 (2 Cir.1972); *In re*

*Folding Carton Antitrust Litigation*, 557 F.Supp. 1091, 1103-04 (ND Ill 1983), aff'd in pertinent part, 744 F.2d 1252 (7 Cir. 1984), cert dismissed, 53 U.S.L.W. 3854 (U.S. May 17, 1985) (No. 84-1266); *Seiffer v. Topsy's International, Inc.*, 70 FRD 622, 625 n.1 (D.Kan. 1976). Accordingly, all claims filed by the date of this opinion will be considered timely.

No further consideration of claims filed late will be made unless the court determines that good and special reason exists for failure to meet the deadline. Class members seeking compensation from the fund in the future must file a claim form or application for payment within 120 days after the veteran dies or learns of a total disability.

The payment program will run for ten years, beginning January 1, 1985 and ending December 31, 1994. No payment will

be made for death or disability occurring after December 31, 1994. Payment will be made for compensable deaths occurring both before and after January 1, 1985. Payments will be made for compensable disability to the extent that the period of disability falls within the ten years of the program's operation. In addition, initial claimants will receive a premium to account for each year the veteran was disabled in the past, up to a total of 15 years.

The court reserves the right to shorten the ten-year operating life of the payment program should unforeseen circumstances occur, such as an unexpected and prolonged drop in interest rates, or a significant increase in claims about those expected.

#### *F. Structure and Amount of*

#### *Disability and Death Benefits*

Payment levels will be dependent on the

total number of disabled or deceased veterans for whom claim is made, the number of claimants meeting exposure requirements, as well as other factors relating to how the payment program is structured. The figures set forth below are estimates based on data presently available. They are subject to adjustment, either upward or downward, once supplemental information has been submitted by the claimants.

The figures are derived from (1) quantitative predictions of death and disability based on statistical analysis of a randomly selected sample of claims forms, the court's review of another randomly selected sample of claim forms, and the court's experience with disability claims in Social Security cases, (2) exposure studies and analysis by

scientific consultants, and (3) a cross-check of claimants against Social Security disability rolls. Nevertheless, the information taken as a whole is sufficiently instructive so that it may reasonably be used for purposes of this opinion as a basis for estimating the amount of the awards that ultimately will be made. As more precise data becomes available in the processing of claims by the disbursing agency, firmer estimates of benefits can be made.

#### *1. Disability Benefit*

Under the death and disability benefit program outlined in this opinion, it is estimated that the maximum award for disability will be about \$12,800, paid over a ten year period. Under the Special Master's proposed plan, the maximum payment would have been about \$25,000. Essentially, the difference arises from

the higher number of claimants potentially eligible for compensation under the more liberal exposure criteria of the court's plan, *see supra* Part IV.D, and from the increase in the number of claims over the Special Master's estimate, including late claims that will be accepted for processing. *See supra* Part IV.E.

Disability awards will be payable in annual installments. Individual awards for disability will vary according to the age of the veteran and the duration of disability. Higher payments will be made for longer disability periods and to younger veterans. Disability awards will end if the period of total disability ends, through either recovery or death.

(a) *Variation in Award Based on Age and Year of Occurrence.* This litigation concerned the exposure of young servicepersons to dioxin-contaminated

Agent Orange in Vietnam. In a young population, the background incidence of disease-connected disability and death is relatively low. Consequently, the disabilities and deaths of young veterans occurring relatively soon after their return from Vietnam are more likely to be perceived as associated with Agent Orange exposure. In contrast, disabilities or deaths occurring many years after service in Vietnam, or among older veterans for whom the background incidence is higher, have a relatively diminished connection with Agent Orange exposure in terms of both public perception and the likelihood of intervening or contributing causes.

The highest total benefit, therefore, will be awarded to those who became disabled soon after exposure at a relatively young age and who continued to be disabled throughout their primary

income-producing years. Implementing this goal while providing significant compensation for existing and future disabilities will require payment levels to be varied according to (1) duration of disability both in the past and in the future, and (2) the veteran's age during the period of disability.

Under this framework, all veteran claimants will receive an award consisting of an incremental payment for each year of total disability after January 1, 1985 through the program's ten year life. That is, an installment payment will be made for each year remaining in the program at the time the claimant becomes totally disabled, if the claimant is totally disabled during the year for which the installment is payable. The question of prorated payment will be addressed during implementation. See *infra* Part IV.F.1.d.

No credit, however, will be given for any year of disability after a veteran's 60th birthday. The few veterans over age 50 at the inception of the program on January 1, 1985 thus will receive lower total awards.

In addition to an award for future disability during the life of the program, a claimant already disabled on January 1, 1985 will receive a premium for each year of past disability, up to a total of 15 years, or beginning January 1, 1970. Because the payment program's emphasis should be on compensation for currently disabled veterans for their existing health problems and for veterans who become disabled in the future, the yearly rate for future disability will be twice that for past disability. Again, no payment will be made for any ear of disability after a veteran's 60th

birthday. A veteran turning 50 on or before January 1, 1985 is still eligible for a payent for each year of total disability between January 1, 1970 and the veteran's 60th birthday, though not for payments for future disability.

The claimant mot qualified under these guidelines is one who was disabled for 15 full years as of January 1,1985, remains disabled and under age 60 for the ten year duration of the program, and meets all other eligibiity criteria. To permit a \$12,800 award to individuals in this category, the yearly rate for future disability would be set at \$731 and the yearly rate for past disability at one-half the future disability rate, or \$365.50. The maximum future disability award would be \$7,310, and the maximum past disability award wold be \$5,482.50, for a total of \$12,792.50. The following

table gives six examples of possible awards based on the estimated \$12,800 maximum. The figures given are based on three assumptions: continuous disability from year of onset of disability; payments to be made in annual installments over ten years; and age of the claimant at 50 or less on January 1, 1985.

[See Chart]

<u>FIRST FULL YEAR OF DISABILITY</u>	<u>TOTAL BENEFIT FOR PAST CONTINUOUS DISABILITY</u>	<u>TOTAL BENEFIT FOR FUTURE CONTINUOUS DISABILITY</u>	<u>TOTAL AWARD</u>
1970	\$5,482.50 (15 years of past disability)	\$7,310 (10 years of future disability)	\$12,792.50
1975	\$7,655 (10 years of past disability)	\$7,310 (10 years of future disability)	\$10,965
1980	\$1,827.50 (5 years of past disability)	\$7,310 (10 years of future disability)	\$9,137.50
1985	\$ -0-	\$7,310 (10 years of future disability)	\$7,310
1990	\$ -0-	\$0,655 (5 years of future disability)	\$0,655
1995	\$ -0-	\$ -0-	\$ -0-

Under this payment system, the maximum total award will go to claimants who are age 50 or less as of January 1, 1985 when the program begins, who have been disabled for 15 years or more as of that date, and who remain disabled throughout the program's ten-year duration. This approach targets for maximum payments veterans who

are between the ages of 32 and 50 at the program's inception, who were disabled in 1970 (then between ages 18 and 35), and who remain disabled for the full ten years of the program.

(b) *Onset of Disability and Payment for Past Disability.* The amount of a veteran's award for disability will depend on the duration of the disability. To receive credit for past disability, the claimant must demonstrate the date of onset of disability. For veteran claimants who have been certified as disabled by the Social Security Administration, the program will use the Administration's determination of the date of onset. For claimants whose date of disability has not been determined by Social Security, the program will apply a presumption that the disability began as of the first day of the program, January 1, 1985, or as of the

date on which the claim is filed, whichever is later. The presumption may be overcome by evidence clearly demonstrating the date of onset. Such evidence would include, for example, a determination of the date of onset made by disability programs other than Social Security, such as those of the Veterans Administration.

(c) *Termination of Payment.* A disability award should end if the period of disability ends, whether by recovery or death. Each award will be paid in annual installments, and payments will cease if during the program's ten-year life either the veteran's condition improves so that he is no longer totally disabled or the veteran dies. If a veteran receiving disability payments dies before the end of the payment program, the veteran's eligible survivors will receive a lump-sum payment at the applicable annual rate for

each full year remaining in the program beginning with the year after the year of death. Payment for the year in which the veteran dies will be at the disability benefit rate rather than the death benefit rate.

(d) *Other Criteria for Calculating Payment.* Criteria must be established to determine the length of time a veteran actually must be totally disabled before becoming eligible for payment, if any; how payments for disabilities beginning and ending during calendar years will be handled; the date of onset of total disability; and the date of termination of total disability, if any. These refinements will be undertaken in implementing the payment program. The administering institution is likely to have far greater expertise in defining this kind of administrative guideline.

Further data is needed from the claimants in any case before eligibility and other criteria can be finalized.

Some examples of the questions that remain to be addressed in implementation are as follows. Because the payment program is intended to compensate long-term total disability, it may be desirable to require a veteran to remain disabled for some period of time - perhaps a year - before becoming eligible for payment; for example, a veteran who becomes totally disabled on July 1, 1985 would have to remain disabled through June 30, 1986. Decisions also must be made about whether and when to award prorate payments for disabilities beginning and ending during a given year. In the example, the veteran might be awarded a payment prorated between the two calendar years of disability - six months at the 1985 level

and six months at the 1986 level (assuming recovery on July 1, 1986). If proration of payment for either onset or termination is considered, the manner of determining the dates of onset and termination must be defined with some specificity. All these matters will be considered further during the actual implementation of the payment program. It is neither necessary nor desirable to address them in approving a general framework for distributing the settlement fund.

## 2. Death Benefit

Surviving spouses or children of veterans who died before January 1, 1985 are eligible for the maximum death benefit. Survivors of veterans who die on or after January 1, 1985 and before January 1, 1995 will receive an award based on the number of years remaining in the program including the year of death.

The Special Master recommended that

death benefits be substantially lower than disability benefits. Special Master's Report, pp. 113-14. It was felt that a program primarily offering payments to a deceased veteran's survivors might make veterans feel that they were worth more dead than alive. The distribution plan for this and other reasons will place primary emphasis on helping veterans while they are still alive. Provision of a more modest death benefit allows greater compensation to be given to living but disabled veterans.

Under the Special Master's proposal, the maximum death award would be \$5,000, payable in annual installments over the program's ten-year duration. The Special Master recommended an installment-based payment plan to keep funds in reserve for unexpected future claims and to permit higher total benefits by generating

interest. The objection has been raised in submissions to the court that spreading a relatively modest death payment over a ten year period significantly diminishes the benefit to the claimant. The retention of control in disbursement of the funds also might be resented by some claimants.

Death benefits accordingly will be paid in a lump sum. Based on presently available data, the maximum payment will be \$3,400. The cost of providing death benefits will be about \$14 million more than the cost of the Special Master's program, because of the increase in claims that will be considered timely filed. See *supra* Part IV.E.

The maximum death benefit will be payable for a veteran who died before January 1, 1985. Survivors of a veteran who dies during the ten year life of the payment program will receive a lump sum payment equal to the applicable yearly

rate (\$340 per year, based on current data) for each year remaining in the program at the time of the veteran's death including the year of death. For instance, based on present estimates, if a veteran dies in 1989, the survivors will be eligible for a lump-sum award of \$2,040 (\$340 per year for each of the six years remaining in the program).

As previously noted, the amount of a disability award will depend on the age of a veteran. The same variation in death payments must be made for the same reasons it will be made in disability payments. In addition, such a variation will avoid troubling discrepancies. An example will illustrate the problem. A veteran disabled as of January 1, 1985 will turn 60 on January 2, 1986. Under the disability payment program, he would receive an award (\$731, based on current data) for the one

year of disability for which he was under age 60. The veteran may remain disabled for the remaining nine years in the program, but is not eligible for further compensation. but if he dies during 1985, before his 60th birthday, his survivors are eligible for a lump-sum death benefit payable immediately (\$3,060 under present estimates, \$340 per year for nine years), in addition to the disability award he would have received had he lived. Limiting payment to deaths occurring before age 60 would not solve the problem. Preservation of the payment program's emphasis on compensating veterans while still alive thus requires that the age of a veteran at the time of death be considered in computing the death benefit. this procedure addtionally will ensure maximum payment for deaths occurring at a relatively young age.

Accordingly, the following guidelines will be followed in awarding death benefits. First, no payment will be made for death occurring at or after age 60. Second, for a veteran who died before January 1, 1985 at an age over 50, the payment amount will be reduced by one year's payment for each year of the veteran's age over 50 at the time of death. For example, if a veteran died in 1975 at age 55, based on currently available data his survivors would be eligible for an award of \$1,700 (\$3,400 minus \$1,700). Third, for a veteran who dies after January 1, 1985 at an age over 50, the lump-sum award will be the total of the incremental payments for each year until the year the veteran would have turned 60, or the end of the payment program, whichever is earlier.

### *3. Variation in Awards Depending on*

#### *Number of Subsequent Claims*

Even after initial claims and questionnaires have been analyzed and a more detailed operational plan for the payment program has been prepared, the number and nature of future claims will remain uncertain. This uncertainty is one of the reasons the Special Master has recommended that both disability and death benefits be paid on an installment basis. The uncertainty must be taken into account in structuring a distribution plan.

(a) *Disability Payments.* The goal of the payment program will be to pay -equal installments in each of the ten years of the program. If future claims increase unexpectedly, however, future yearly installment payments may have to be decreased below the target level set by the first year's payment. If they are less

than expected, the court will determine whether to increase payments to claimants or pay the excess to the class assistance foundation in 1995 for the benefit of all members of the class. See *infra* Part IV.F.5. to make provision for this contingency, the following guidelines will be followed.

The target amount for all yearly payments will be the amount of the first yearly payment. The actual amount of each yearly installment will be fixed in the year before it is payable. It may be lower or higher than the target amount because claims analysis has shown that more or less future claims will be made than originally expected. The size of the next installment payable thus will be "guaranteed." Later installments will not be guaranteed, and may be decreased or increased if future claims are greater or

less than expected.

(b) *Death Payments.* As indicated, death benefits will be payable in a lump sum rather than installments. Payments on future death claims will be subject to adjustment at the time of death, depending on whether more or less claims have been or will be made than anticipated. The target amount for calculating death benefits in any given year of the payment program will be based on the yearly increment used to compute death benefits the first year. The actual amount of each yearly installment will be fixed in the year before it is payable. The death benefit payable in subsequent years may be decreased or increased to account for an increased or decreased number of future claims. See *infra* Part IV.F.5.

(c) *Lump-Sum Versus Installment Payments.* Lump-sum awards for early death,

unlike installment awards, cannot be adjusted in later years to account for a changed incidence of future actual claims as against predicted claims. The number of early death claims and the amount of the resulting death benefits payable, are relatively small. The change in disability installment payments and in late death claim payments to account for increased or decreased future claims therefore will be about the same whether death benefits are paid in a lump sum or on an installment basis.

#### *4. Amounts Payable*

The following table gives estimates of the total amounts that will be paid from the program to various categories of claimants. The calculations are based on the following assumptions: (1) 7,500 dead and 17,500 disabled as of the date of this opinion; (2) for those who have not filed

claims as yet, subsequent deaths and disabilities those that would be expected from the general male population of equivalent ages; (3) for those who have filed claims, a somewhat higher incidence of subsequent deaths and disabilities; and (4) an percent annual interest return. The amounts shown as "total paid" include the original \$150 million, plus interest earned over the life of the program, less administrative costs. The "Maximum payment" is the maximum obtainable under all eligibility criteria and qualification factors based on present information. It is subject to adjustment up and down.

	MAXIMUM PAYMENT	AVERAGE PAYMENT	TOTAL NUMBER OF RECIPIENTS	TOTAL PAID (Millions)
<u>1. Disability Payment</u> (disability began before January 2, 1985)	\$12,800	\$ 9,600	14,000	\$134.4
<u>2. Disability Payment</u> (disability began after January 2, 1985)	\$ 7,300	\$ 2,400		\$ 40.3
<u>3. Total Disability</u>	\$12,800	\$ 5,700		\$174.7
<u>4. Death Payment</u>	\$ 3,400	\$ 3,400		\$ 20.4
<u>5. Death Payment</u>	\$ 3,400	\$ 1,000		\$ 12.1
<u>6. Total Death</u>	\$ 3,400	\$ 1,800		\$ 32.5
PROGRAM TOTALS	\$12,800	\$ 4,200		\$207.2

The total of \$207.2 million is greater than the \$150 million set aside for the program because of the assumptions about interest rates and dates of payment. Variations in these factors will require adjustments up or down in the payments.

#### 5. Disbursement of Any Excess Remaining at Program Termination

If the number of claimants subsequently

found to be qualified under the eligibility criteria discussed above is less than estimated, more funds will be available for disbursement. The Special Master has recommended that any funds remaining at the end of the payment program be transferred to the endowment program of the class assistance foundation to be administered on behalf of the class as a whole, particularly children with birth defects. As the Special master has observed, "[t]he needs of children suffering from birth defects are enormous and long-lasting. Furthermore, as parents pass their prime income-producing years, their ability to care for adult children with birth defects diminishes." Special Master's Report, p. 177. It is even possible that birth defects may increase in frequency or severity in subsequent generations. Thus in the future there may be an even greater demand for assistance from the class assistance foundation than at present.

In light of these considerations, the Special Master's recommendation is both thoughtful and reasonable and is adopted. The court has ample authority to provide

for such a transfer of funds between distribution programs. See, e.g., *Curtiss-Wright Corp. v. Helfand*, 687 F.2d 171, 174-75 (7 Cir.1982); *Beecher v. Able*, 575 F.2d 1010, 1016 (2 Cir. 1978); *Zients v. Lasorte*, 459 F.2d 628, 630 (2 Cir.1972). The court reserves the right to provide for an upward adjustment of payments to claimants using some or all of any surplus that may develop. Under no circumstances will any funds revert to the defendants.

*G. Means and Impact of Payment on*

*Public and Private Assistance*

A means test, by which applicants would be asked to supply information on their personal finances and access to other death and disability benefits, might seem to be a desirable method of extending the effective reach of the payment program by channeling compensation to those with the most need. The nature of our socioeconomic system, however, together with the probable cost of implementing such a requirement, makes a means test virtually impossible to administer. It may do more harm than good at great expense to the fund.

An enormous overlapping complex of

benefits has grown up in our society, in part because of a desire to induce private initiative. The well-to-do undoubtedly may receive more than others: They may be compensated by special retirement and disability schemes of the government and private sectors, private insurance policies, Social Security disability benefits and have, in addition, substantial personal resources preventing economic deprivation. In contrast, the very poorest members of society are least likely to be able to protect themselves by private means or by exploring fully the maze of public benefits. The disparity is almost unavoidable.

Coordination of Agent Orange settlement awards with each applicant's personal resources and public benefits would require claimants to submit a great deal of private information. A substantial amount of administrative work to untangle the threads of collateral sources, including case-by-case determinations and review of numerous documents, would be needed. A means test thus would be both extremely difficult to administer and very costly. Moreovr, such an approach would

penalize those veterans who have managed to set aside resources. Accordingly, payment program awards will be made without regard to income or other resources.

There is reason to be concerned about the disadvantaged members of the class. Many class members receive welfare and other forms of need-based public assistance. Such programs may base the amount of benefits on a recipient's resources; they may seek to recoup past payments should a recipient's resources increase. See generally, e.g., Characteristics of State Plans for Aid to Families with Dependent Children (SSA Pub. No. 80-21235, 1984); Characteristics of General Assistance in the United States (HEW Pub. No. (SSA) 78-21239, 1978); Baldus, Welfare as a Loan: An Empirical Study of the Recovery of Public Assistance Payments in the United States, 25 Stan.L.Rev. 123, 125 (1973); Anot., 80 A.L.R.3d 772 (1977). The court has received requests from local welfare agencies and others that any payments to which the individual veteran or his family may be entitled be made to the agency.

Apart from the costs of recovering welfare payments, it seems manifestly unfair to permit welfare and other public assistance agencies to take payments from the Agent Orange settlement fund for past benefits conferred. As Professor Baldus put it:

Recovery may have been a justifiable policy in [the early 19th Century when recovery laws were first adopted], but today the social costs it generates far outweighs the budgetary savings and marginal social benefit it produces.

Baldus, *supra*, 25 Stan.L.Rev. at 135. See also *id.* at 125 n.3.

The intent of the settlement and distribution plan is to provide financial help to alleviate some of the suffering of needy class members, not to reimburse state and local governments. A tort settlement, conceptually and in practice, is intended to compensate an individual for injuries to his or her person. Such a monetary recovery is neither income nor resources in the sense of realized gain. See, e.g., *Grunfeder v. Heckler*, 748 F.2d 503, 510-12 (9 Cir. 1984) (Ferguson, Schroeder and Alarcon, JJ., concurring).

ayments from the settlement fund shold, to the extent permitted by law, not be subject to recumptment by public assistance agencies.

The equities in future benefits are less compelling. As one judge put it:

[T]here is [a great] difference between denying eligibility for assistance to one with substantial assets in hand derived from a tort claim, and recovering assistance from a former welfare recipient who succeeds in receiving compensation for injuries. In the first case \*\*\* the victim has the means of immediate subsistence - a test of eligibility; if the recovery had been [small] instead of [large], he might still be eligible for aid. In the second, the attachment of a meager recovery can effectively destroy the means for future subsistence independence as well as remove the financial comfort given as compensation for physical pain. As a result, self-sufficiency may be jeopardized, and return to relief hastened.

*Snell v. Wyman*, 281 F.Supp. 853, 872 (SDNY 1968) (three-judge court) (Kaufman, J.,

dissenting), aff'd mem., 393 U.S. 323, 89 S.Ct. 553, 21 L.Ed.2d 511 (1969).

Statutory grounds do exist for exempting settlement fund payments from consideration in determining eligibility for public assistance. Legislation to conform such a result in the case of Agent Orange awards is desirable.

Conflicts between tort compensation principles and public assistance eligibility criteria have arisen most notably in the context of Aid to Families With Dependent Children (AFDC) programs. Section 602(a)(17) of title 42 of the United States Code, a part of the Social Security Act, governs ineligibility for AFDC payments resulting from receipt of nonrecurring lump sum income. It requires state AFDC plans to provide that if an AFDC recipient or certain family members receive in any month "an amount of earned or unearned income" that together with all other nonexcluded income exceeds the state's standard of need for the family, that lump sum will be considered income to that individual in the month received. The family will be considered ineligible for aid for a prescribed period of time. The

nonrecurring lump sum income in effect is treated as a substitute for AFDC. The state at its option may provide for certain narrow extenuating circumstances. 42 U.S.C. Sec. 602(a)(17) (as amended by the Deficit Reduction Act of 1984, sec. 2632, 98 Stat. 1141).

A strong line of authority holds that tort recoveries are not "income," earned or unearned, within the meaning of the AFDC lump sum rule. See *Barnes v. Cohen*, 749 F.2d 1009 (3 Cir. 1984); *LaMadrid v. Hegstrom*, 599 F.Supp. 1247 (WD Va 1984); cf. *Grunfeder v. Heckler*, 748 F.2d 503 (9 Cir. 1984) (Holocaust reparations payments not "income" for Supplemental Security Income (SSI) eligibility purposes).

This position treating recovery from a tort litigation as nonincome is not inconsistent with congressional design. The legislative history of section 402(a)(17) does not clearly define "income." See *Barnes*, 749 F.2d at 1016-17; *LaMadrid*, 599 F.Supp. at 1454-56; *Reed*, 591 F.Supp. at 1255-57; HR Conf. Rep No. 861, 98th Cong., 2d Sess. 1400, 1410-12 (1984), U.S.Code Cong. & Admin.News 1984, p. 697. Tort recoveries are excluded from income under

the Internal Revenue Code of 1954, as amended. I.R.C. sec. 104(a)(2). That Congress has not provided a special definition of "income" in the AFDC statute suggests a plan to use a definition paralleling that used in other federal laws such as the tax laws. *LaMadrid*, 599 F.Supp. at 1457-58; *Reed*, 591 F.Supp. at 1256-57; cf. *Grunfeder v. Heckler*, 748 F.2d 503, 506, 510-12 (9 Cir. 1984) (majority and concurrence point to exemption of Holocaust reparations payments and tort awards generally from definition of income for tax purposes). But see *Betson v. Cohen*, 578 F.Supp. 154, 159 (ED Pa 1983) (absence of specific provision in AFDC statute similar to IRC sec. 104(a)(2) awards, rev'd on other grounds *sub nom.* *Barnes v. Cohen*, 749 F.2d 1009 (3 Cir. 1984)).

Supporting the statutory argument is the fact that inclusion of personal injury recoveries as "income" under the AFDC lumpsum rule is contrary to the common meaning of the term "income", which includes the concept of gain. A tort recovery is not a gain but replacement of a loss. As the district court explained in

*LaMadrid:*

A personal injury award does not increase the measurable worth of the individual receiving the award. \*\*\* [A]n award for property damage is an award to replace something lost, like a car or a stove. A personal injury award likewise compensates a person for loss of a resource, whether it be a lost body part or loss of the ability to function in a certain manner. Compensation for person injuries functions to restore the recipient to the status she or he enjoyed prior to the injury. A personal injury award merely serves to make the person "whole" or to restore what was lost by the injury. There is not the measurable gain which is an essential part of the common definition of "income."

While no amount of money can actually replace a lost body part, the concept of damages has always been viewed as a way to make the injured party whole.

*LaMadrid*, 599 F.Supp. at 1456 (citations omitted). See also *Barnes*, 749 F.2d at 1017-18; *Reed*, 591 F.Supp. at 1256; cf.

*Grnfeder*, 748 F.2d at 511 (concurrence discussing absence of gain from tort-award).

Given these consideratins, a strong showing shold be required before it is concluded that Congress intended to subject personal injury recoveries such as those received from the Agent Orange settlement fund to the AFDC lump-sum rule. Recent decisions to the contrary generally have not addressed the specific issue of whether tort awards are "income" within the meaning of the AFDC statute. See *Walker v. Adams*, 741 F.2d 116 (6 Cir. 1984) (no discussion of issue); *Sweeney v. Murray*, 732 F.2d 1022 (1 Cir. 1984) (no discussion of issue; no stateent about whether personal injury award involved); *Duckworth v. Miller*, 127 Ill.App.3d 1088, 83 Ill.Dec. 214, 469 N.E.2d 1148 (1984) (no discussion of issue); *Hickey v. New Mexico Department of Human Services*, 102 N.M. 265, 694 P.2d 521, 526-27 (N.M.Ct.App. 1985) (recognizing issue exists though not presented on appeal; tort award not involved). But see *Littlefield v. Maine Department of Human Services*, 480 A.2d 731, 739-41 (Me.Sup.

Jud.Ct. 1984) (personal injury award not income). Obviously, the matter is not free from doubt; should the matter of AFDC benefits arise in the context of an Agent Orange award, the particular case would require the kind of adversarial hearing not now possible.

A result favorable to the claimant, excluding compensation based on loss, has been reached in the context of need-based public assistance under SSI. See *Grunfeder v. Heckler*, 748 F.2d 503 (9 Cir.1984) (Holocaust reparations not to be considered in determining SSI eligibility). Personal "penitent purpose"; they are designed to compensate for the "deprivation of personal rights." *Id.* at 508. The three concurring judges in *Grunfeder* in fact would have rested the holding in that case on the tort compensation character of the funds received. See *id.* at 510-12.

There are many need-based assistance programs at the federal, state and local levels, including veterans pension benefits. See 38 U.S.c. sec. 503; *Peed v. Cleveland*, 516 F.Supp. 469 (D.Md. 1981). A comprehensive solution to the dilemma faced

by poor veterans and their families requires national legislation. Such legislation also could confirm the result reached in the instant case wth respect to recoupment of past benefits. Surely this is the least our country can do for the Vietnam veterans who served it honorably and well, and who have gone so long wthout the thanks and recognition they deserve.

The Special Master is directed to bring this matter to the attention of appropriate legislative and executive bodies under the same restrictions as set out *supra* Part III.A with respect to birth defect legislation. In the interim, the court will make payment program benefits available on condition that no lien for a preexisting payment or agreement for reimbursement be recognized.

Similar problems may be experienced by class members in dealing with their private insurance carriers. Individual determinatons of eligibility for cash compensation under the payment program may not be treated by insurance companies as affecting coverage of class members found eligible. First, the exposure test that will be used is deliberately

overinclusive. See *supra* Part IV.D. It in no way serves as definitive evidence that a veteran was exposed to dioxin at all, much less that he or she was exposed to significant levels of dioxin. Second, the nontraumatic death or disability standard that will be used in lieu of a causation test also is deliberately overbroad. See *supra* Part IV.A. It may not be relied upon as evidence that a particular death or disability is causally related to war activities.

Thus there is no basis either for treating a class member claimant as a high risk because the exposure test has been met, or for invoking a "war related" clause in an insurance policy. Eligibility for payment program compensation may be given no weight in determining private insurance coverage.

## *H. Implementation and Operation of the Payment Program*

Immediate steps are needed to implement the payment program even though payments to claimants cannot be made until appeals are completed. See also *infra* Part VII.

### *1. Administration by Private Contractors*

The court lacks the capacity to administer the program. More appropriate institutions will be required to perform necessary professional and administrative services. First, the services of a claims processor or processors will be needed to receive and analyze death and disability claims, maintain records, conduct exposure and death or disability reviews, and make payments. Second, the assistance of actuaries, auditors, investment counsel, and management consultants will be required at various times. Third, expert assistance in drafting claim forms,

exposure assessment, medical disability review, survey research and data processing may be needed. Fourth, experts will be needed to provide requests for bids and perform services preliminary to putting the program into operation.

The need for these professional and administrative services will be intermittent. If in-house staff were hired, the program would be understaffed during busy periods and overstaffed at other times. Use of outside contractors will provide high-quality services during very active periods, but preserve fund resources during less active times. In addition, outside contractors will be able to make a heavy commitment of resources during the first year, to assure prompt and effective implementation of the programs. The fund will avoid the unnecessary start-up and overhead costs of

operating an in-house program.

Good business practices will be followed in procuring services from outside contractors. An open bidding process will be used to ensure that professional and administrative services are obtained at a competitive price. Although overly bureaucratic mechanisms should be avoided, the procedure must be sufficiently formal that any appearance of self-dealing or other impropriety is prevented.

Possible suppliers of services will be contacted by the Special Master. The requirements and constraints will be explained and proposals solicited. For any significant contract, bids will be sought from several providers. See also *infra* Part VII.C.1.

In selecting contractors the following specific criteria among others will be

taken into consideration: ability to supply high-quality and cost-effective service without cost overruns; reputation, experience, expertise and reliability, including past record of delivering quality services on time and within budget; efficiency of operation; sophistication of organization and capacity to minimize bureaucracy and cost; and sensitivity to the concerns and special needs of class member claimants. The services required may be performed by one or several contractors. For example, for processing claims a large institution or consortium of smaller companies might be selected, depending on the advantages presented by their respective proposals. It may be advantageous to have the disbursing agency combined with or separate from the claims processor and investor of funds.

Providing for proper solicitation and bidding will require experts in the field of insurance. Subject to the court's control, the Special Master is authorized to contract with consultants for such service. It must be emphasized to the consultants that protection of the fund, maximum benefits to the class, and low-cost, efficient and high-quality service are prime desiderata. Precautions will be required to ensure that the disbursing or other contracting agency does not receive a windfall should approved payments fall below predictions.

## *2. Preparation of Application Forms*

The preliminary claim form was designed to determine the initial number of potential claimants and solicit general information about them. It was not intended to elicit the detailed information about death, disability and

exposure needed to implement the payment program. Additional data must now be obtained and analyzed. A first step will be to develop detailed application forms that will be sent to all claimants to determine which are eligible for payment.

The forms will be designed to determine whether a veteran meets class membership requirements, including Agent Orange exposure, and whether the veteran is dead or totally disabled. To determine exposure, the application will contain questions regarding the specific dates and locations of the veteran's Vietnam service and veteran's job assignments in Vietnam. To determine whether death or long-term total disability criteria are met, the application will seek information about the veteran's medical condition, whether the death or disability was caused by traumatic, accidental, or self-inflicted

injuries, and whether the Social Security Administration has classified the veteran as disabled specifically for efficient computer processing and analysis.

Experts will assist in drafting the application forms to ensure that necessary information on exposure and disability is elicited, and that computer coded forms are properly designed. It probably would be useful to have the contractor that will receive and pass on claims and make disbursements participate actively in the development of the application form. The completed draft application must be approved by the court.

### *3. Distribution and Return of Applications*

After application forms are developed, they will be mailed to all claimants who will have filed a timely initial claim form. Eligibility criteria and payment

levels cannot be finalized until data from claimants are received and analyzed. To minimize delay claimants will be given 60 days from date of mailing to complete and return the application. Assistance will be provided for claimants who have questions about completing the application. See *infra* Part VII.A.5. Claimants submitting the late applications will not be entitled to receive payment for the first year, but will be eligible for payment in the second year.

#### *4. Processing and Appeals*

The procedure for processing applications set out below is illustrative only. Details will be modified on the basis of recommendation from the consultants and contracting agency or agencies.

The contract with the disbursing and any other contracting agency shall be arranged so that no greater profit is derived by it through rejection of claims,

thus avoiding a conflict of interest. At the same time internal checks and auditing should ensure use of proper standards in passing on claims.

Once received, an application for payment ordinarily will go through a four-step claims review process: initial screening and data entry, exposure review, death and disability review, and issuance of payment to the qualified applicant. A computerized tracking system will monitor the progress of all application forms.

Applications will be checked for completeness. Then they will be screened to determine whether the applicant claims exposure and death or a qualifying disability. Basic information about the applicant and the claim will be entered into a computerized system that will track the application through the review process. This system will enable the claims

review facility to respond to the applicant's inquiries about the application's progress and to report to the court on the number of claims received and their processing status.

Applications then will be analyzed to determine whether the veteran was exposed to Agent Orange. See *supra* Part IV.D. Those receiving a positive exposure finding will go forward for disability review. Claims based on nontraumatic death or Social Security disability will be verified quickly and sent on for check issuance. Claims without a verified death or Social Security disability finding will receive a disability review. Checks then will be issued to qualified applicants.

The full disability review process will use routine insurance industry procedures to determine dedical eligibility for payment. Persons trained in applying

medical criteria and disability guidelines will examine the applications and medical evidence to determine whether a long-term total disability exists. The claimant will be required to submit appropriate documentation, including a statement of diagnosis, relevant test results, and medical history. A doctor's statement of disability without explanation or objective medical evidence ordinarily will be insufficient. For example, the American Medical Association's Guide to the Evaluation of Permanent Impairment may provide guidelines for appropriate medical proof of impairment. The claim reviewers also may take into account evidence that the claimant is or is not deemed disabled under various other disability programs including Veterans Administration programs.

Claimants found ineligible for payment

because of lack of total disability or absence of exposure will be entitled to appeal. A claimant would initiate the process by filing a written statement detailing the basis for the appeal. Assistance in filing appeals could be provided through existing outreach and veterans assistance organizations. See *infra* Part VII.A.5. The appeal will be heard by an independent reviewing authority. It will consist of one or more persons appointed by the court.

An appeal will be based on the written record unless the review board decides otherwise. The review board will determine the appropriate disposition with a brief written statement of its reasons. The decision will be final.

#### *S. Benefit Calculation and Adoption*

##### *of Final Payment Levels*

After all eligibility screening is

complete, an actuary will calculate benefit levels for each class of claimants based on age and duration of disability. See *supra* Part IV.F. Benefit level estimates set forth in this opinion are based on a series of factually based assumptions about the characteristics of the class members and the anticipated number of claims. Once the applications have been processed and analyzed, eligibility criteria may be adjusted. The precise benefit levels then will be calculated. The court will adopt final eligibility criteria and benefit levels and authorize the first disbursements. The Special Master shall expedite setting up the system so that first payments can be made before May 1, 1986, assuming that appeals have been completed by that time.

See *infra* Part VII.C.1.

## *6. Annual Reviews and Continuing*

### *Eligibility Reviews*

In addition to the claims review process, which will continue throughout the payment program, various annual reviews will be conducted to adjust program guidelines as future claims are filed. As claims experience is gained, the eligibility criteria and payment levels established in the first year may require modification.

Disability payments will be discontinued if a claimant recovers, dies, or reaches age 60. See *supra* Part IV.F.1.b. Disability claims will be reviewed each year for continuing eligibility. Claimants will be required to provide a brief statement of continuing eligibility in sufficient time to ensure timely check processing and disbursement.

## *7. Court Control and Reports to the Court*

The settlement agreement in this case provides that the "Fund shall be maintained and administered by the Court and shall be under the Court's continuous jurisdiction, control and supervision to assure that the Fund shall earn the maximum interest consistent with safety and that all disbursements are properly made." *In re "Agent Orange" Product Liability Litigation*, 597 F.Supp. 740, 864 (EDNY 1984). Rule 23(e) of the Federal Rules of Civil Procedure additionally imposes a responsibility on the court to protect the interests of all class members by ensuring that the class settlement fund is distributed equitably. See *supra* Part II. Particularly because the class is large and diverse, the court must continue to supervise distribution until the fund

has been disbursed. Thus this court must exercise continuing control over the assets and disposition of the settlement fund.

Each contracting agency will forward a report to the court at the end of each year in which it supplied services. The report shall be designed to provide detailed information on the financial status of the payment program. The report of the appropriate contracting agency shall recommend the appropriate benefit levels for the next year and set forth the analysis of claims received and projected requirements for compensation of future claimants on whch payment level calculations are based. After reviewing the report, and consulting the administering institution as necessary, the court will adopt payment levels for

that coming year. See *supra* Part IV.F.

The annual stockholders' report of the administering institution or its equivalent and such other reports as the court may request will be provided to the court as soon as available. An independent audit will be conducted annually. See *infra* Part VII.C.4. Significant unexplained accounting irregularities, unreasonable administrative cost overruns, fraud, breach of fiduciary responsibilities and similar occurrences will be considered material breaches of the contract to administer the payment program. The court reserves the right to terminate any contract if its responsibility to protect the interests of the class so requires.

#### *B. Veterans Advisory Group*

The court will promptly appoint an

advisory group of Vietnam veterans that will be consulted in the planning and development of the payment program. Many class members have expressed the view that veterans should have a significant role in the distribution of the settlement fund. See, e.g., *In re "Agent Orange" Product Liability Litigation*, 597 F.Supp. 740, 858 (EDNY 1984). The veterans' sensitivity to the needs of their fellow class members may be valuable in structuring the payment program. The advisory group's views will be solicited on the following matters, among others: bidding procedures; selection of contractors; selection of auditors; development of application forms and an information program; and operation of the payment program. Members of the advisory group will receive no compensation beyond reimbursement of

**out-of-pocket expenses.**

Members of the advisory group may be appointed to the initial board of directors of the class assistance foundation. See *infra* Part V.B.2. Alternatively, veterans may be appointed to the advisory group whose professional expertise would be of particular value in operating the payment program, but who will not be members of the foundation board of directors. Some overlap probably is desirable, to facilitate exchange of information of interest to both groups. See, e.g., *infra* Part VII.A.

#### ***I. Private Attorney Fee Arrangements***

The payment program shall be designed to minimize the need for expensive legal assistance by simplifying the quantity and nature of the documentation that a claimant must submit to support his or her application for payment. With the possible

exception of the applications of claimants seeking full independent disability review, see supra Part IV.H.4, no legal expertise or special skill of any kind should be needed to complete a preliminary claim form or application for payment, or to obtain military records or records relating to findings of disability or cause of death. The institutional or institutions selected to administer the payment program will so far as possible assist claimants in completing payment applications and obtaining necessary records. See *infra* Part VII.A.5.

A number of class members filing claim forms have indicated that they are represented by counsel. Some of these attorneys may seek to enforce fee agreements with disabled veterans and with families of deceased veterans who are eligible for payments from the program.

The court has already awarded attorney fees and expenses payable from the settlement fund for lawyers' work that benefited the class by contributing to the creation of the fund. See *In re "Agent Orange" Product Liability Litigation*, 611 F.Supp. 1296 (EDNY 1985). All class members, whether or not represented by other counsel, were found to be subject to *pro rata* assessments of the overall fee award against their respective shares of the class settlement. *Id.*, 611 F.Supp. at 1316. Each class member claimant therefore has already paid for all legal work from which he or she received any benefit:

In the instant litigation it is clear that any benefit received by a class member resulting from the creation and distribution of the settlement fund arises from efforts by the relatively few attorneys receiving

fees for time spent in prosecuting the class action. \*\*\* The efforts of any other lawyer on behalf of an individual class member client at best contributed less than marginally toward any recovery ultimately to be received by that class member from the fund.

*Id.* 611 F.Supp. at 1316.

The only other activities of lawyers that arguably benefit a class member claimant receiving a payment program award are the filing of a preliminary claim form, the completion and submission of an application for payment, and the assembling and forwarding of military and medical records. These routine clerical tasks are not the sort of work for which a lawyer should obtain a substantial fee. See, e.g., *Allen v. United States*, 606 F.2d 432, 536 (4 Cir. 1979); *Hoffert v. General Motors Corp.*, 656 F.2d 161, 165-66

(5 Cir.), *reh'g denied*, 660 F.2d 497 (1981), *cert denied sub nom. Cochrane & Bresnahan v. Smith*, 456 U.S. 961, 102 S.Ct. 2037, 72 L.Ed.2d 485 (1982); *Drause v. Rhodes*, 640 F.2d 214, 218-20 (6 Cir.), *cert denied sub nom. Sindell, Lowe & Guidubaldi v. Attorney General of Ohio*, 454 U.S. 836, 102 S.Ct. 140, 70 L.Ed.2d 117 (1981); *Dunn v. HK Porter Co., Inc.*, 602 F.2d 1105, 1109-10, 1112 & n.9 (3 Cir. 1979); ABA Code of Professional Responsibility DR 2-106 (A), (B).

The court reserves the right to review private fee arrangements and void or modify them when unreasonable. This power and responsibility arises under Rule 23(e) of the Federal Rules of Civil Procedure and court's supervisory authority over counsel. *Dunn*, 602 F.2d at 1108-10, 1114. It is the law of the case that "[t]he only fee or expense award recoverable from the

settlement fund or a class member's individual recovery is one awarded \*\*\* by \*\*\* court order." *In re "Agent Orange" Product Liability Litigation*, 611 F.Supp. 1296, 1317 (EDNY 1985).

Claimants of course have the right to retain counsel to file their applications for them, however routine the work involved may be. Attorneys who are thus freely retained are entitled to be paid. But fees for such mundane clerical tasks must be modest to be reasonable. Counsel fees accordingly will be subject to court supervision and control. Guidelines for reasonable fees will be set as necessary once the payment program has been implemented and exact eligibility criteria and payment levels are known. Payment program application forms should include information on court supervision of

attorney fees. Clear instructions and help in filling out the forms will be provided to minimize the need for legal assistance.

*See infra* Part VII.A.5.

#### V. CLASS ASSISTANCE FOUNDATION

The majority of claimants will not meet the eligibility criteria for cash compensation under the payment program. Nevertheless many of these claimants may have health problems and other needs. They should receive some benefit from the settlement. Distribution of thousands of small individual payments would trivialize the beneficial impact of the settlement fund on the needs of the class. The most practicable and equitable method of distributing benefits to this segment of the class is through funding of services. *See supra* Parts II, III.D, and III.E, and Introduction to Part IV.

The Special Master has recommended as a

second major distribution program that a class assistance foundation be established to fund projects and services that will benefit the entire class. See Special Master's Report, pp. 151-228. This recommendation as modified below is adopted.

#### A. General Framework

The fairness opinion discussed many of the suggestions for disposition of the settlement fund that were made at the Fairness Hearings and in other submissions to the court. *In re "Agent Orange" Product Liability Litigation*, 597 F.Supp. 740, 858-61 (EDNY 1984). Among these were suggestions that funds be set aside to aid children with birth defects born to class member veterans, and that a national center for Vietnam veteran assistance be established to provide Vietnam veterans and their families with "a visible,

central source of legal and political power." *Id.* at 859.

Maintaining a large part of the fund for a class assistance foundation can serve as a national focus for Vietnam veterans who are class members to mobilize themselves and others to deal with their medical and related problems. Because the foundation will direct the spending of a large pool of money to fund services, it will have a greater impact on the problems of the class than if thousands of small, individual payments were made. In addition, the foundation will provide class members with leverage in seeking to make public and private institutions more responsive to the medical problems of the class. The foundation should be in a position to obtain matching and other grants and contributions from private and public bodies. It will have considerable

leverage to obtain medical and related assistance from existing organizations for members of the class.

#### *1. Funding Priorities*

Children with birth defects born to class member veterans should receive special consideration from the foundation. Over 60,000 children are estimated to have had claims filed on their behalf alleging birth defects and health problems resulting from their fathers' exposure to Agent Orange. Even though no currently available scientific evidence establishes any causal link between exposure of veterans to Agent Orange and any birth defect, the desirability of alleviating the suffering of these children and their families is compelling. In addition, the sentiment has repeatedly been expressed to the court that a plan for disposition of the settlement fund should promote harmony

and unity within the class rather than create discord and divisiveness. Class members and veterans group representatives who have made their views known to the court generally agree that something should be done to aid the children with birth defects and their families. See, e.g., *In re "Agent Orange" Product Liability Litigation*, 597 F.Supp. at 765-66, 860. Helping meet the needs of these children and their parents should be one of the main priorities of the foundation.

The various distribution proposals and other submissions to the court also demonstrate widespread support for the establishment of legal and social service projects to benefit Vietnam veterans exposed to Agent Orange and suffering some disability and their families. The second major priority of the foundation therefore should be to help meet the medical and

related social service needs of the class as a whole.

Under the Special Master's proposal, \$30 million would be allocated to a children's fund, which would issue grants, contracts and other awards to benefit children with birth defects. Another \$30 million would be used to establish a service fund, which would issue grants, contracts and other awards to help meet the service needs of the entire class. Special Master's Report, pp. 151, 155, 178-89. Under the court's plan, over \$45 million will be allocated to the foundation. This endowment will be administered as a single fund, rather than as two separate funds, allowing greater flexibility in performing the foundation's designed functions.

## 2. Funding Structure

A general objective in distribution is

to minimize administrative costs so that the settlement fund is conserved and the benefit to the class is maximized. There should be no elaborate bureaucracy. Quality volunteer assistance should be sought in all aspects of administration. Settlement funds should not be used to duplicate existing services.

These principles also apply to the activities of the class assistance foundation. Numerous existing organizations, some with general mandates and others dedicated to veterans only, are currently helping to meet the medical and related service needs of the class. Many provide high quality services but lack the resources to meet class demands. The foundation cannot afford to duplicate already existing services nor should it create a new bureaucracy to fill service gaps. Rather than provide services itself,

the foundation should fund the expansion of existing projects and encourage the creation of new projects to help meet class needs. The foundaion thus will take advantage of groups that have already developed expertise and will exposre new ways to benefit the class.

The foundation may fund projects that directly benefit individual claimants as well as projects that help the class in general. Foundation funds need not be limited to existing organizations. Seed grants can be provided to create new institutions to serve this class. The foundation should encourage existing service organizations that do not yet focus on the Vietnam veteran community to develop new services for the class. The foundation also may help individual class members in dire financial need by issuing emergency grants or loans.

The class assistance froundation can structure its funding in many different ways. It could, for example, (1) enter into fee-for-service contracts with existing facilities; (2) issue annual grants to organizations to expand their existing projects; (3) provide seed monies to existing groups to help start new projects; (4) issue challenge grants to spur donees to find funding from other sources; (5) issue matching grants to augment funding from other sources; or (6) fund cooperative ventures with other institutions in collective projects. Thus, as a funding rather than service organization, the foundation could extend the reachof its initial endowment, increasing the impact of its program on class problems.

### *3. Persons Who Should Receive Services*

Projects funded by the foundation should be designed to benefit the class of persons whose claims are covered by this settlement. See *In re "Agent Orange" Product Liability Litigation*, 100 FRD 718, 729 (EDNY 1983), *mandamus denied*, 725 F.2d 858 (2 Cir.), *cert denied*, 104 S.Ct. 1417, 79 L.Ed.2d 743 (1984), quoted *supra* Part I. Funding should be directed to projects that focus on this class rather than on society as a whole or on the general veteran population, even though indirect benefits may flow to this broader group of veterans and family members from the foundation's activities. Some worthwhile projects may not be able to deliver services exclusively to members of the class, but efforts should be made to inform and encourage class members to participate in foundation-funded projects. In addition, the claimants - those class

members who have filed or will file a claim to participate in the settlement - should be the initial focus of projects that provide intensive services to individuals.

Because the foundation forms a part of the distribution plan in his class action, it must require those wishing to use foundation-funded services to prove exposure to Agent Orange in Vietnam. See *supra* Parts I and IV.D. The exposure requirement need not be the same as that used by the payment program. The burden of administering an exposure test as stringent as that of the payment program would be far greater for the foundation, which will be funding services for the entire class. Interposition of a strict exposure requirement would seriously impede the prompt and efficient provisi of services to class members. The foundation

thus will be permitted to devise appropriate exposure criteria in light of its mandates and funding priorities. These may include a presumption similar to that used by the Veterans Administration. See 50 Fed. Reg. 15,853 (1985) (to be codified at 38 CFR Sec. 3.311a(4)(b)). The exposure test proposed by the foundation will be set forth in the comprehensive plan to be submitted to the court by the initial board of directors. See *infra* Part VII.C.2. The proposed criteria will be subject to court approval.

Many members of the class are outside the mainstream of society. The foundation in issuing grants or entering into contracts should make efforts to see that funded services reach these people and their families. The special needs of incarcerated veterans, those facing language barriers, those living in rural

areas or on Indian reservations, and those who are isolated from their communities should be considered in reviewing grant applications or contract offers. The foundation should make a concentrated effort to fund projects that will reach this often forgotten segment of Vietnam veteran community. See also *infra* Part VII.A.1.

Children born on or after January 1, 1984 are not members of the class. The settlement agreement states that these afterborn children may elect to receive benefits from the distribution of the settlement fund but that such an election by them or on their behalf waives their right to sue the seven defendant chemical companies for injury from Agent Orange exposure. See *In re "Agent Orange" Product Liability Litigation*, 597 F.Supp. 740, 864-65 (EDNY 1984). The court has made no

ruling on the enforceability of this implied waiver. An afterborn child who does not seek benefits from the fund is not bound by the settlement agreement. See also *infra* Part VII.A.1.

#### B. Governance

##### 1. *Tax-Exempt Status and Organization*

###### *in Perpetuity*

A basic theme heard during the Fairness Hearings was that class members - Vietnam veterans and their families - should have a significant role in the implementation of any plan for disposition of the settlement fund. See *In re "Agent Orange" Product Liability Litigation*, 597 F.Supp. 740, 858 (EDNY 1984). The class assistance foundation affords veterans the unique opportunity to mobilize themselves and others to deal with the enormous problems of the class. Because Vietnam veterans are the most sensitive to the needs and

desires of the class, Vietnam veterans - whether or not they claim exposure to Agent Orange - to the greatest extent possible should govern the foundation.

To facilitate class governance of the foundation, the foundation will be organized as a not-for-profit, tax-exempt entity in perpetuity. The Special Master has had extensive analyses of the issues involved prepared with the aid of volunteer lawyers who generously donated their services. See Special Master's Report, pp. 421-93. The pro bono efforts of Lani Adler, Esq. of O'Melveny & Myers and William B. Bonvillian, Esq. of Brown, Roady, Bonvillian & Gold were particularly helpful.

The foundation will have a board of directors, which will implement the foundation's mandate. Creation of a perpetual organization will give class

members an entity that can help meet class needs beyond the 25-year term of the settlement agreement, especially the long-lasting needs of children suffering from birth defects..

Tax exempt status will increase the amount of money available to the foundation for grants to assist the class. Charitable tax status should be considered for the foundation as well. Status as a charitable organization under section 501(c)(3) of the Internal Revenue Code would enable it to obtain charitable contributions tax deductible to the donors.

## *2. Board of Directors*

The court will appoint the initial board of directors to govern the foundation. The intial board will have between 15 and 45 members and will be comprised primarily of Vietnam veterans.

The board membership will reflect a cross-section of the veteran community, cutting across social, gender, economic, geographic and occupational lines. To the extent possible, individuals will be appointed whose experience will be of particular help in implementing the foundation's program. For example, the board may include a health care professional familiar with birth defects, a social service professional familiar with family counseling services, and an attorney with experience in providing legal aid to veterans. Board members will serve without compensation except for reimbursement of reasonable expenses.

Once appointed, the board will be self-governing and self-perpetuating. Terms of service, mechanism for succession, and size of the board will be established in the corporate bylaws,

subject to the intial board's approval.

The board will control every aspect of foundation administration, subject to the responsibilities retained by the court. See *infra* Part V.C.1. It will establish its own internal organization and procedures, including scheduling of meetings and issuance of regular reports. Because of its size, the board should form a number of standing committees and an executive committee to which certain areas of responsibility could be delegated to conduct foundation business more efficiently and effectively. These committees could schedule their own meetings and issue reports to the board for full board action. The Special Master will assist the board as necessary during the initial stages of implementation to establish such internal mechanisms.

The board will determine such matters as investment and budget decisions, specific funding priorities, a detailed grant application process, the actual grant awards, evaluation mechanisms, and fundraising strategies. The board will be responsible for preparation of annual budgets, annual audits, and other financial reports for the foundation, and for submission of these reports to the court for review. See *infra* Part V.C.1. As part of this review, the court may obtain a further independent audit. See *infra* Part VII.B.4.

### 3. Executive Director

The board of directors will be running a foundation with an endowment of over \$45 million and an ambitious agenda over the next quarter-century. It should be assisted by someone having extensive experience with foundations or other charitable

institutions and knowledge about organizations that may be able to provide services to class members.

Accordingly, the court will appoint a committee to search for such a person to serve as executive director of the class assistance foundation. The search committee will be comprised of prospective members of the initial board of directors. The court will consult the committee and review its recommendations before appointing the initial executive director.

Because a highly capable individual with a great deal of expertise is needed, a competitive salary will be offered. The executive director will report to the board and may be discharged by the board. Any successor to the initial executive director will be named by the board. If deemed necessary by the board, the executive director may retain additional

professional and other help.

The executive director's responsibilities should include: (1) helping to define the foundation's funding priorities; (2) soliciting grant applications and contract offers and preparing requests for proposals; (3) evaluating the grant applications and contract offers; (4) recommending projects for funding for broad approval; (5) monitoring the projects funded to ensure that the grantee or the contractor is meeting the needs of the class; and (6) developing mechanisms to leverage the foundation's endowment to increase its ability to meet the needs of the class.

### *C. Funding and Disbursement*

#### *1. Court Supervision of Disbursement*

As already pointed out *supra* Part IV.H.7, the terms of the settlement agreement and the responsibility imposed by Rule 23(e) of the Federal Rules of Civil Procedure require the court to exercise continuing control over the assets and disposition of the settlement fund until all funds have been disbursed. A comparatively modest supervisory role in the operation of the class assistance foundation will satisfy these mandates.

All of the money remaining in the settlement fund after the payment program and foreign distribution plans are funded will be allocated to the foundation. Thus the foundation will have an initial endowment of over \$45 million, as a single fund, rather than as two separate children's and service funds. See *supra* Part V.A. This fund may be increased by

court order should experience with the payment fund permit transfers. See *supra* Part IV.F.5.

The Special Master has recommended that the court retain control over the foundation's endowment and its investment for the entire 25-year life of the foundation's program. As stated in this and earlier opinions, class members should have as substantial a role as possible in the governance of the distribution plan. Accordingly, once the foundation is fully operational, the initial endowment will be transferred to the foundation. The board will be responsible for all further investment and budget decisions. Richard J. Davis, Esq., the Special Master for Investment Policy appointed by the court, who is providing his services without fee, will be available for initial consultation.

The board will submit detailed annual budgets, biannual budgetary status reports, and biannual financial and investment statements to the court for review. The court will retain jurisdiction over the foundation and its endowment and will have the power to intervene. The court will retain the power to supervise foundation operations actively and will exercise control as necessary to protect the interests of the class. The court may request further information from the board regarding operations as necessary to carry out its obligation to the class.

This oversight mechanism will enable the court to fulfill its mandated responsibility to supervise all disbursements of the settlement fund. It allows the board of directors to make all procedural and substantive decisions necessary to run the foundation, including investment of the endowment, establishment

of funding priorities and the actual awarding of grants.

## *2. Rate of Payout and Future Needs*

The Special Master's Report discusses the need to balance the competing goals of quick disbursement of significant funds to meet immediate needs versus modest payout in the early years to maintain a substantial endowment for future needs. In resolving this conflict, the Special Master recommended that the board of directors be allowed to invade the corpus of the initial endowment as the board deems necessary to fund projects. See Special Master's Report, pp. 178-95. More money thus would be available to meet the current needs of initial claimants.

Although the Special Master's recommendation is not unreasonable, the court believes that a greater emphasis on meeting future needs is appropriate.

Accordingly, the foundation's endowment will be preserved for the first ten years of the foundation's existence - that is, until December 31, 1994 - and no invasion of corpus will be allowed, except by court order on recommendation of the foundation's board. Only interest and earnings from the initial endowment, plus private and public contributions, will be used to fund projects during the first ten years, unless court permission to invade corpus is sought and obtained -- for example, if an invasion of corpus is necessary to preserve the foundation's tax exempt status.

Under the Special Master's proposal to establish two separate funds to be administered by the foundation, the children's fund endowment was to be disbursed in 25 years. The service fund endowment was to be disbursed in ten years, on the grounds that the service

fund should focus on the "more immediate legal and social service needs of current and future claimants." Special Master's Report, p. 188. The prohibition on invasion of corpus for ten years undercuts the suggested ten-year lifetime. The absence of a reason to set different operational periods for the two funds is a further basis for allocating the entire endowment of the fundation to a single fund covering both mandates.

The foundation fund will have a lifetime of 25 years, the term of the settlement agreement. Assuming a ten percent return on investment, about \$4.5 million will be available annually to the board of directors for the first ten years to fund services. Any money raised by the foundation will be added to this amount and will not be subject to limitations on invasions of corpus. For the remaining 15

years, the board may invade corpus, so that the entire endowment including interest and earnings, but excluding the indemnity reserve discussed below, is disbursed by the end of the 25th year. The rate at which corpus is invaded during the 15-year period will be determined by the board. The requirement that the initial endowment be disbursed in 25 years does not mean that the foundation could not issue grants that provide for services and programs that will remain in operation past the end of the 25-year period.

*3. Indemnity Reserve and Payout of  
Balance of Endowment Remaining  
After Twenty-Five Years*

The settlement agreement provides that the settlement fund "shall indemnify \*\*\* defendants \*\*\* for all final compensatory judgments (excluding settlements), exclusive of costs and attorneys' fees,

rendered against any of them in all state-court actions alleging harm caused by exposure to Agent Orange in or near Vietnam, not to exceed an aggregate amount of \$10 million." *In re "Agent Orange" Product Liability Litigation*, 597 F.Supp. 240, 864 (EDNY 1984). Thus \$10 million must be kept in reserve to indemnify the defendants until May 7, 2008.

The indemnity obligation will be borne by the class assistance foundation rather than the payment program, since the latter will not be in existence for the entire 25-year indemnity period, and an indemnity obligation would unduly hamper its operation. Accordingly, \$10 million of the foundation's endowment must be set aside as an indemnity reserve, and the board of directors may not disburse these funds for any other purpose during the 25-year period of the settlement agreement. The interest and earnings from the \$10 million

reserved will be available for the entire 25 year period to be used by the foundation to fund services for the class.

The settlement agreement stipulates that "[a]fter 25 years from the date of this agreement, any balance remaining in the Fund shall be disposed of in such manner as the Court may direct." *In re "Agent Orange" Product Liability Litigation*, 597 F.Supp. 740, 864 (EDNY 1984). A substantial balance is likely to remain at the end of that 25 year term because most, if not all, of the \$10 million reserved to indemnify the defendants probably will still be intact. Any such remaining balance will be transferred to the class assistance foundation to continue its work so long as the foundation deems necessary, particularly the funding of services addressed to the needs of children in the class suffering from birth defects. Money

obtained by the foundation through fundraising, of course, may also be used by the board of directors to further the foundation's mandate in perpetuity. See *infra* Part V.F for further discussion.

#### *D. Mandates and Goals in Funding*

##### *Services*

The broad mandates of the class assistance foundation are twofold: first, to fund projects to aid children with birth defects and their families and alleviate reproductive problems; and second, to fund projects to help meet the service needs of the class as a whole. See *supra* Part V.A. The board of directors will adhere to these broad mandates and will develop funding priorities and award grants to further these mandates. The board will make all decisions about specific funding priorities on a fully independent basis, including the relative

emphasis to be given to each of the broad mandates.

The Special Master's Report contains a number of thoughtful recommendations with extensive accompanying discussion for the guidance of the board of directors in carrying out its mandates. See Special Master's Report, pp. 196-216. This Section will summarize the points made in the Special Master's Report, for the board's consideration.

#### *1. Possibilities for Funding of Birth*

##### *Defect and Reproductive Problem*

##### *Programs*

Repeated suggestions were made at the Fairness Hearings that programs be funded to aid children of class member veterans with birth defects. Among the goals suggested to the court were the following:

- encouraging research concerning birth defects, monitoring research to

determine if causal connections can be scientifically verified, and making single or annual grants to assist families with children with birth defects. Such assistance could include, to the extent that funds are available, payment of medical expenses, vocational training, scholarships, and special costs of care and help to ameliorate the difficulties of this portion of the class. Financial and social needs of the family would be appropriate criteria for eligibility.

*In re "Agent Orange" Product Liability Litigation*, 597 F.Supp. 740, 861 (EDNY 1984).

A primary goal of the class assistance foundation accordingly should be to issue grants or contracts for projects that will help children with birth defects lead a more normal life and will ease the heavy

burden on the families of these children.

A broad definition of the term "birth defect" should be used. Special Master's Report, p. 197 n.70. A second major goal would be to fund projects to meet the service needs of those couples suffering from reproductive problems, including miscarriage-related problems and fear of parenting because of the veteran's exposure to Agent Orange.

(a) *Maximizing Access to Existing Services and Provision of Family Support Programs.* Many children with birth defects have enormous long-lasting needs for medical treatment and health care. The foundation cannot afford to provide would be to help these children and their families take advantage of existing private and public resources. Many existing health care and social service resources are underutilized because people

who could use these resources are unaware of their availability and do not know how to find out what services are available.

Accordingly, priority should be given to funding projects that will maximize access to existing health care and social services for these children and their families. Professor Rand E. Rosenblatt, a health care expert appointed by the court pursuant to Rule 706 of the Federal Rules of Evidence, suggests that "the most effective ways to meet a wide range of unmet needs [are] coordination of care \*\*\*, advocacy, and strengthening the family's capacity to deal with the stresses of major childhood illness and disability." Special Master's Report, pp. 511-12. Programs that would further this care coordination approach might include some of the following.

(1) Case management services. Skilled health professionals could train a family

to deal with their child's health problem and work with health care providers and benefit programs to help improve care and benefits.

(2) Protection and advocacy services. Skilled advocates could provide numerous services, including ensuring accurate diagnoses and treatment, improving placements in special education programs, securing appropriate vocational training, establishing family support groups and educating parents, assisting in applications to benefit programs, helping solve housing and transportation problems, and securing community-based living arrangements for institutionalized children.

(3) A public hotline and referral service. Such programs could help families locate the most convenient and appropriate treatment and social service centers.

(4) Grants to hospitals and clinics.

This money might assist families, especially those in isolated rural areas, in defraying travel costs incident to a child's medical treatment.

*(b) Additional Projects and Emergency Financing for Medical Services.* Although maximizing access to existing health and social services would be a first priority, to the extent feasible financially and technically the foundation also could fund programs to help meet the medical, educational, vocational, social and other needs of children with birth defects and their families. As the Special Master pointed out, "[i]n many cases, especially as these children grow older and their medical problems become stabilized, needs will change, and the demand for care coordination may decrease." Special Master's Report, p. 202. Potentially

beneficial programs not strictly involving care coordination might include some of the following: (1) affordable, innovative insurance programs for these children; (2) special education grants to help devise new techniques to teach children with learning disabilities; (3) grants to an existing scholarship fund or educational loan program to provide financial assistance for these children, so that they can pursue higher education; (4) grants to establish peer support groups to enable children with birth defects to discuss their problems openly among themselves; (5) vocational training projects, perhaps in cooperation with targeted industries, to provide an opportunity for specialized job training; and (6) limited, focused research to develop new treatment techniques, medical services, and diagnostic tests.

In addition to funding projects, the foundation could set aside a special account to meet emergency needs of children with birth defects and their families. Grants or loans could be provided to families in grave financial need to help pay for essential medical services. These limited emergency grants could be used to help defray the costs of essential medical devices, emergency surgery, or life-sustaining drugs, among other necessary services.

(c) *Reproductive Problems and Genetic Counseling.* The reproductive problems of the class fall within the foundation's mandate. Some class members have stated that they are reluctant to have children because they fear that exposure of servicemen to Agent Orange will result in genetic damage in their offspring. Tens of thousands of claims have been filed for

miscarriages said to be related to Agent Orange. The foundation should consider financing programs for genetic sounseling of couples concerned about their future children as well as projects to help couples cope after a miscarriage occurs.

A survey of genetic counseling centers has been made to determine the availability of genetic counseling services for the class. See Special Master's Report, pp. 531-73. The survey contains valuable information on the availability and cost of services, but also highlights the major problem involved in providing classwide genetic counseling: Because no currently available scientific evidence links Agent Orange to any discrete birth defect or combination of birth defects, genetic counselors cannot tell clas members what Agent orange "causes," nor can they reassure them that

Agent Orange exposure is harmless. Many Vietnam veterans seeking an explanation for their children's birth defects are frustrated because current genetic counseling services cannot provide definitive answers.

Nevertheless, genetic counseling may have some value for those couples who are still considering having children. A standard genetic counseling session may be of help to potential parents, even though the impact of Agent Orange exposure cannot be assessed. In addition to educating potential parents about general risks of birth defects, genetic counseling services will review family history and assess the particular risks of childbearing for a given couple. The value of such services to class members, however, will decrease in the relatively near future as more and more women in the class grow too old to

have children.

In addition, counseling services and support groups could be funded for class members who have become emotionally distraught in the wake of a miscarriage. The foundation also could fund projects to develop new techniques for counseling couples suffering from reproductive problems they believe are related to Agent Orange exposure.

## *2. Possibilities for Funding of Class-wide Services*

The classwide service program concept originated in the suggestions made to the court during the Fairness Hearings that a national center for Vietnam veterans assistance be established. Such a national center, it was suggested, could perform the following:

provide legal assistance concerning claims against the Veterans

Administration; undertake litigation to compel agencies of the government to comply with the law and assist Vietnam veterans; seek further legislation in the Congress and state legislature in the Congress and state legislatures to improve the lot of the Vietnam veteran; mobilize lawyers, doctors, and the business and education communities to help Vietnam veterans and their families; encourage research and training for the medical profession in treating Vietnam veterans and their families; and undertake such other activities, including counseling and veteran advisory services, as will assist the Vietnam veterans and their families.

*In re "Agent Orange" Product Liability Litigation*, 597 F.Supp. 740, 859 (EDNY 1984). Other related possibilities

suggested to the Special Master include outreach efforts to all class members, public education and awareness, vocational training and educational assistance. Special Master's Report, p. 152.

The primary goal for funding of classwide services would be to issue grants or contracts for projects that will help meet the medical and related social service needs of Vietnam veterans and their families. This method of providing services differs from the national center idea originally suggested to the court in that the class assistance foundation will fund programs through grants or contracts, whereas the national center was conceived of as an actual supplier of services.

Though many in the class need health care and medical treatment, the government is responsible for providing such treatment and care for the veterans

through the Veterans Administration. See *supra* Part III.A; 38 U.S.C. sec. 610. The foundation, however, could fund projects to help class member veterans better obtain and utilize VA services and to monitor the VA and other federal and state services to ensure that they are responsive to the needs of the class.

In addition to advocacy and monitoring projects that oversee operation of government programs, the foundation could finance projects to (1) increase public awareness of the problems of the class; (2) provide health information to the class; (3) give social service assistance to the class; and (4) help members of the class become a more integrated part of society. Programs funded by the foundation could serve as visible symbols, much like the Agent Orange litigation itself, around which class members can organize to help

themselves.

The issuance of grants or contracts for lobbying of federal and state legislatures should not be undertaken by the foundation. One of the strengths of the existing network of veterans organizations is its collective lobbying ability. Funding of lobbying could duplicate existing efforts and might lead to friction with the existing veterans lobbying network. The foundation should not expend its endowment on lobbying, particularly when many other service gaps exist that need to be filled. Lobbying might well impair the foundation's tax status. I.R.C. Sec. 501(c)(3)-(4).

(a) *National Vietnam Veterans Advocacy Center.* Witnesses at the Fairness Hearings, a number of distribution proposals submitted to the court, and suggestions received by the Special Master

have called for the establishment of a national legal center to help veterans exposed to Agent Orange. Although existing organizations already engage in extensive legislative lobbying efforts at the federal and state levels and provide individual counseling to veterans about their rights, it was felt that an additional need exists for a national legal center that will work for increased Vietnam veteran benefits through litigation and formal administrative proceedings.

Given the level of funding provided, supporting such a legal center seems impracticable. The primary focus of the foundation must be on medical and related problems. Nevertheless, in obtaining medical services for the class, legal problems and litigation needs may arise.

The foundation is therefore authorized to issue grants or enter into contracts with existing organizations to provide advocacy services through a national Vietnam veterans advocacy center or a network of centers. Funds might be used to help pay the costs of test cases of particular interest to the class or individual class members and to provide medical advocacy to help educate members of the class about VA and other health care programs, increasing their understanding and ability to take advantage of available health services.

The foundation could extend its funding to provide these services in many ways. For example, much of the individual legal assistance could be obtained by contracting with law school clinics, using senior law students who would receive academic credit rather than cash compensation for their services. A grant

could be given to an existing organization-to help coordinate and organize pro bono activities by the private bar for class members.

(b) *National Hotline and Referral Service, Agent Orange Information Clearinghouse, and Public Education Programs.* The Special Master's suggestions about a national hotline, referral service, Agent Orange information clearinghouse and public educational services also were made by others. See Special Master's Report, pp. 211-15, 574-90 on funding of specific programs. The limited funds available may require giving such projects a low priority.

(c) *Other Projects.* In addition to the programs already discussed, to the extent feasible financially and technically the foundation could provide grants or contract for services to meet the health,

education, vocational and psychological needs of the class members who have filed claims with the settlement fund. Claimants who are not eligible for the payment program, but who suffer from significant partial disabilities or other serious health problems, should receive special consideration. See Special Master's Report, pp. 215-16.

#### *G. Grant and Contract Procedures*

The board of directors will be responsible for developing an agenda of priorities and a detailed set of regulations to govern the grant application process and other aspects of the foundation's operations. In developing an agenda and rules, the board will need to work closely with the executive director and such professional consultants, including physicians, lawyers and accountants, as it deems desirable.

## *1. Development of Specific Funding*

### *Priorities*

Before the foundation can begin operations, its funding priorities must be defined by the board. The more focused the priorities, the easier it will be to solicit and evaluate applications, target funds, and monitor activities to ensure that the priorities are being met. The board of directors, with the help of the executive director, thus should produce detailed funding priority statements, subject to modification in the light of experience. Sampling of class members' opinions and direct contacts with members of the class would help the board ascertain class members' views. See Special Master's Report, pp. 217-20. The board itself, however, will take full responsibility for making the hard decisions necessary to operate the

foundation.

## *2. Grant Application and Review Process*

The board of directors should be prepared to initiate a funding process as soon as possible after its members have been appointed by the court. The board will be required to submit a plan for foundation operations to the court within eight months after the appointment of its members. See *infra* Part VII.C.2. In developing procedures for soliciting and reviewing grant applications, the board should consider the following guidelines.

(a) *Open and Competitive Bidding.* The foundation will need to establish the most competitive and efficient system to ensure the best services are obtained for the class. In some cases, the executive director would issue a general request for proposals to allow any group to apply for funding. In other cases, that process

might be inefficient and the executive director probably would ensure better services by solicitin proposals from the existing groups providing the service. If there are very few qualified proposals, the executive director should explain why solicitation of additional proposals would not be likely to result in better services.

(b) *Review of Bids and Monitoring of Ongoing Projects.* The executive director would make the initial review of all grant applications and contract offers and screen out those that do not meet foundation requirements. If necessary, the executive director would refer qualified bids to expert peer review committees for technical and professional evaluation and funding recommendations. The executive director would consider the peer review evaluations and make funding recommendations to the board, which must

approve all grants and contracts.

Peer review committees could be established by the board. They would be comprised of experts in various fields relevant to the foundation's mandates. The experts generally would serve without compensation except reimbursement of expenses. Peer review committees could be established for each of the foundation's general project areas. For example, there could be a peer review committee of health professionals for health-related projects.

The executive director also would develop mechanisms for monitoring and evaluating the performance of service suppliers. One such method would be to condition disbursements of funds on receipt of quarterly status reports and an annual accounting and audit. The expert peer review committees also could be enlisted to help in the monitoring and

evaluation process.

*3. Service Suppliers Represented on  
the Board of Directors*

Representatives of existing veterans organizations and state Agent Orange commissions may serve on the board of directors of the foundation. These representatives are likely to be knowledgeable about Agent Orange and Vietnam veteran issues, and such expertise would be a significant asset for the board. The organizations there board members represent probably will have experience in meeting the needs of Vietnam veterans. Therefore, these organizations probably would be interested in and qualified for funding by the foundation.

Funding proposals from these organizations should be encouraged, but self-dealing must be avoided. Accordingly, certain safeguards must be built into the grant process. Whenever an organization

having a representative on the board is recommended for funding by the executive director, full disclosure must be made to the board. In addition, the executive director must fully explain in the recommendation to the board why this organization is the best qualified for funding. The board additionally should develop specific procedural safeguards to ensure fair administration of the foundation. These safeguards would balance the need to encourage existing veterans groups to seek funding from the settlement with the need to eliminate any appearance of impropriety in the funding process.

#### F. Fundraising

The board of directors should develop fundraising strategies to augment the initial endowment of the class assistance foundation. Money from the initial endowment can be used to initiate fundraising efforts, but such efforts

should become self-supporting as quickly as possible. The prestige and name of the court should not be invoked in any way in fundraising activities. See Canon 5(B)(2) of the Code of Juicial Conduct. No one engaged in fundraising activities should make any reference to the court or any statement that the court endorses or is involved in the solicitation.

#### *1. Matching Grants, Joint Ventures*

##### *and Similar Devices*

The objective of the foundation is to have as great an impact as possible on problems facing the class. The board and executive director should develop ways to increase the leverage of foundation funding and thus maximize the reach of this program. Grants could be conditioned on the grantee obtaining matching grants from other sources. Cooperative projects funded jointly by the class assistance foundation and other foundations,

organizations or industry could be developed. One-time seed money grants could be used to encourage the creation of new institutions to help the class.

## *2. Charitable Contributions*

The board of directors should seek private donations to augment the foundation's initial endowment from the settlement fund. As discussed *supra* Part V.B.1, in establishing the not-for-profit organization that will govern the foundation, tax-exempt status will be sought, to enable the foundation to obtain individual and corporate charitable contributions. The board should look to these private sources of funds as a way to multiply the beneficial impact of the settlement fund on the class.

Because private donations are outside the scope of the settlement agreement, any additions to the original endowment gained through fundraising would not be subject

to the jurisdiction of the court or the strictures of the settlement agreement.

#### VI. AUSTRALIAN AND NEW ZEALAND CLAIMANTS

The settlement includes the claims of Australian and New Zealand veterans and their family members as well as those of United States class members. Arguably, because the settlement agreement did not distinguish foreign class members from their American counterparts, Australian and New Zealand claimants should be treated no differently in distributing the settlement fund. Under this view, these class members would submit applications for payment to the payment program and seek services from the class assistance foundation just as would American class members.

But the service needs and desires of the foreign claimants and the availability of government and private services in those countries may differ greatly from

the situation of class members in the United States. Both countries, for example, apparently have more extensive publicly funded health and medical programs than does the United States. An effort should be made to fund projects tailored to the needs of the Australian and New Zealand claimants.

The only practical way of accomplishing this goal is to turn over a portion of the fund to a single organization in Australia and one in New Zealand, to be administered as a trust on behalf of class members in those countries. A single trust institution could be created for Australian and New Zealand class members, or two could be established, one in each country. Such an organization must be established by the government and class members in each country working cooperatively. The court lacks the

resources and requisite familiarity with foreign legal, political, social and economic systems to create an umbrella entity on its own. The trust fund framework, however, must be set up with some degree of consensus. approval will not be given to a proposal hat simply would entrust the funds to one of a number of competing veterans organizations.

The distributon plan adopted by the trust, though subject to court approval, may be completely independent of the plan set out in this opinion. Alternatives rejected here may be practical overseas because of differing circumstances. Any reasonable distribution plan will be permitted. The Special Master will be available for consultation on the creation of a trust institution and formulation of a distribution plan.

If no satisfactory umbrella administrative proposal is forthcoming for a given country, the funds allocable to that nation's claimants will not be administered separately. Such claimants will participate in the payment program and the service the class assistance foundation on the same basis as claimants in the United States. See *supra* Parts IV and V.

Because the needs of foreign class members and the legal and institutional mechanisms required to meet those needs may differ from those of the United States class members, a representative of these foreign class members would be consulted by the foundation's board of directors and the payment program advisory group. The representative should be familiar with the veteran community in his or her country as well as the government and private services available to veterans and their

families.

If an umbrella administrative plan is approved by the court, funds will be allocated in proportion to the number of Vietnam veterans from that country. According to figures provided by the United States Department of Justice, of the total number of Vietnam veterans who served with the United States, Australian and New Zealand armed forces, 2,595,200 were from the United States, 48,400 from Australia, and 3,842 from New Zealand. See Letter from Arvin Maskin, Trial Attorney, Torts Branch, Civil Division, United States Department of Justice, dated March 29, 1985. Foreign veterans from these two allies constitute about 2 percent of the total. Rounding off the figures, 1.8 percent of the settlement fund would be allocated to Australia and 0.2 percent to New Zealand. Of the \$200 million that will

be available, \$4 million thus would be set aside, \$3.6 million for Australia and \$400,000 for New Zealand.

A preliminary trust plan has been submitted for administering the funds allocable to Australian class members. See Draft Memorandum and Articles of Association of Australian Vietnam War Veterans Trust limited, filed March 25, 1985; Letter from Joseph F. Kelly, Jr. dated March 21, 1985, filed March 25, 1985; Letter from Joseph Kelly, Jr. dated April 5, 1985, filed April 10, 1985. The plan apparently has the support of the Australian government and two major Australian veterans' groups - the Vietnam Veterans Association of Australia and the Returned Services League of Australia. The Australian government took an active role in resolving differences among interested parties and in ensuring that a single plan

was submitted for administration of the Australian funds.

Mr. A.T. Gietzelt, Australian Minister for Veterans' Affairs, has informed the court that the Honorable Mr. Justice Leycester Meares, formerly of the Supreme Court of New South Wales, has agreed to be chairman of the trust. The board of trustees would be composed of the chairman, appointed by the Australian Minister of Veterans' Affairs, two members appointed by the VVAA, two appointed by the RSL, one appointed by the Australian Veterans and Defence Services Council, and one appointed by Legacy Coordinating Council, an organization concerned with the care of the surviving spouses and dependents of veterans. None of the trustees will be paid for their services except for out-of-pocket expenses. The trust will be incorporated as a tax-exempt

organization. It also will be able to draw on the administrative resources of the participating organizations, thereby minimizing administrative costs.

The preliminary proposal for an Australian trust fund is under consideration. The organizational framework should be finalized and a distribution plan submitted by October 1, 1985. The Special Master will be available for consultation.

The court has received a number of submissions from counsel and veterans' organizations in New Zealand. The New Zealand government appears to be willing to oversee the establishment of a trust in which the various New Zealand veterans groups would participate, taking a role similar to that of the Australian government regarding an Australian trust fund. As yet, however, the court has not

received a confirmation from the New Zealand government of its willingness to oversee the formulation and submission of a trust proposal as well as the implementation of such a plan once approved by the court. It would be desirable for the chairman of any such trust to be appointed by the New Zealand Minister in Charge of War Pensions or by some other government official, and for the New Zealand government to confirm to the court that any trust proposal submitted has the support of veterans groups such as the New Zealand Returned Services Association, the New Zealand Ex-Vietnam Services Association, and the New Zealand Vietnam Veterans Association. The specific terms of the trust would depend on the provisions of New Zealand domestic law.

No comprehensive proposal for administration of funds in New Zealand has yet been received. No framework for separate distribution can be approved at this time. Further submissions must be received by September 1, 1985. The Special Master is requested to assist interested parties including the New Zealand government in formulating and forwarding an administrative proposal. If a satisfactory plan is not forthcoming by September 1, 1985, New Zealand claims will be handled under the distribution plan outlined in this opinion.

#### VII. IMPLEMENTATION AND OPERATION

##### OF THE DISTRIBUTION PLAN

Until the appellate process has concluded, no disbursements can be made from the settlement fund, either as individual awards from the payment program or as grants and contracts from the class

assistance foundation. Nevertheless, while appeals are pending all necessary preliminary steps can and should be taken to render the distribution plan as close to fully operational as possible. These interim organizational efforts will permit the benefits of the settlement to reach the class in a uniform and expeditious manner.

#### *A. Communications with the Class*

Effective implementation of the distribution plan will require continuing efforts to inform class members about the settlement, the benefits available from the payment program and the services funded by the class assistance foundation. Because the foundation will be the more permanent institution, funding services with classwide impact across the country, it will bear primary responsibility for informing the class.

Further information also must be collected from the claimants - those class members who have expressed an interest in participating in the settlement by filing a claim form. Because these communications for the most part will relate to the implementation of the payment program, the payment program will bear primary responsibility for collecting more information from claimants.

Insofar as possible, classwide mailings should be coordinated to reduce the drain on settlement funds.

#### *1. Publication of the Terms of the Plan*

Even though no subsequent claims for persons who died or became totally disabled more than 120 days ago will be considered timely filed without further order of the court, efforts to encourage participation of class members in the settlement must continue. Veterans and

their families must be made aware of the fact that claims still can be filed for deaths and total disabilities that occur in the future - measured from 120 days before issuance of this opinion. In addition, class members who have yet to file claim forms must be informed of the details of the distribution plan so that they can take advantage of services that will be funded by the class assistance foundation.

Particular emphasis should be placed on efforts to communicate with class members who are outside the mainstream of society. Special efforts of this kind were mad in distributing notices of settlement with claim forms to the class. The cooperation of the governors of the states and the Federal Bureau of Prisons was solicited in reaching incarcerated veterans. Claim forms were forwarded to veterans groups

and Hispanic and black organizations for copying and distribution. Information was provided to members of Congress for dissemination. These and similar endeavors must continue to ensure an effective distribution of the settlement fund. Special steps must be taken to reach incarcerated veterans, those facing language barriers, those who live in rural areas or on Indian reservations, and those who are isolated from their communities. See also *supra* Part V.A.3. For example, informational mailings and payment application forms should be translated into Spanish and copies of the translations be made available to Hispanic veterans groups and other organizations.

Various groups can be called on to help inform the class about the provisions of the distribution plan. These groups, moreover, may provide ideas on how best to

serve the Vietnam veteran community. Permanent relationships should be established between the class assistance foundation and groups such as the following: existing veterans organizations and nonprofit veteran service organizations; state government agencies, particularly departments of veterans affairs and state Agent Orange commissions; federal government agencies, including the Bureau of Indian Affairs, the Federal Bureau of Prisons and Veterans Administration facilities, including vet centers; governors of each state and local elected officials; members of Congress; community, social, fraternal and ethnic organizations; and broadcast and print media, through public service messages and public affairs programming.

Notice of the terms of the distribution plan will be provided to those who have

already filed claim forms in the coordinated mailing to all claimants. See *infra* Parts VII.A.3 and VII.A.4. The notice will outline the eligibility criteria for the payment program, discuss the range of services that might be funded by the class assistance foundation, and list telephone numbers and addresses that the claimant can use to obtain further information about these programs and services.

Afterborn children or their guardians who file claims must be informed about the settlement agreement's provision that an afterborn child's election to accept benefits from the settlement fund waives any right to sue the defendants for any claim arising out of the subject matter of this litigation - that is, a claim alleging harm caused by exposure of a parent to Agent Orange in or near Vietnam. A

statement to this effect therefore will be included with the application forms that will be sent to all claimants. Afterborn children who later seek foundation-funded services should be advised of this provision as well.

*2. Periodic Notice About the Operation  
of the Plan*

Information about the operation of the distribution plan will be distributed periodically to award recipients through the payment program, and to other class members through the communications network and other means available to the class assistance foundation. Provision of such information to the class is important. The funding of service programs by the foundation would be frustrated if class members did not know that the services were available.

A periodic notice could report jointly on payment program and class assistance foundation operations. It should inform the class of any changes in the eligibility criteria for the payment program and outline services funded by the foundation. It should include information on foundation board meetings and court proceedings concerning the distribution plan.

Existing veterans groups regularly communicate with the Vietnam veteran community. Those responsible for developing and distributing the periodic notice should consult these groups to determine the most effective and cost-efficient method of disseminating information to the class.

### *3. Mailings to Prospective Payment*

#### *Program Claimants*

Implementation of the distribution plan, particularly the payment program, will require more information to be obtained from claimants. Collection of this information will be given priority. Specific payment program compensation levels, exposure parameters, and the relative weight given to various eligibility criteria all depend on the data to be submitted by claimants. Information collection thus must begin as soon as appropriate forms can be developed.

The Special Master will initiate development of payment application forms with the assistance of consultants. The forms should be simple and easy to understand, so that they can be filled out by class members with a minimum of legal or other assistance. Because of the high cost of communicating with such a large

group, the application forms should be comprehensive so that one mailing will elicit all the information needed. So far as possible, the forms should be designed for computer coding and perhaps optical scanning to facilitate processing. Comprehensive payment application forms will include at least two forms - an exposure questionnaire and an application for payment.

The exposure questionnaire will solicit detailed information on exposure to Agent Orange. See *supra* Part IV.D. Anyone wishing to participate in the payment program must complete this questionnaire. The class assistance foundation may limit certain services based on exposure, or fund a program providing individual exposure assessments. See *supra* Part V.A.3. Claimants wishing to take advantage of services that will be funded by the foundation therefore may be required in

the future to complete and return the exposure questionnaire.

The application for payment must be completed and returned by claimants who wish to be considered for cash compensation from the payment program. The application form will instruct the claimant to include medical documentation regarding the death or disability, and will request the claimant to sign a privacy waiver that will allow access to the veteran's military and medical records. Only spouses or children of deceased veterans, and those veterans who believe they suffer long-term total disabilities, should complete the application for payment. Claims for death or disability from traumatic, accidental, or self-inflicted causes will not be eligible for cash compensation. See *supra* Part IV.A.

In completing the exposure questionnaire and the application for payment, claimants will be made aware that they are submitting information to a court-supervised entity and that they may be subject to penalties for supplying false information. The filing of a false claim in a class action in federal court is a serious federal crime. See 18 U.S.C. secs. 2, 371, 1341. As a safeguard against fraud, each claimant will sign under penalty of prosecution for perjury a statement that the information supplied in the exposure questionnaire and the application for payment is true to the best of the claimant's knowledge.

#### *4. Coordinated Mailings by the Class*

##### *Assistance Foundation*

The foundation board of directors probably will need information to help establish specific funding priorities. See

supra Part V.E.1. If the board develops a services survey and a birth defects questionnaire, efforts will be made to coordinate the mailing of the board's information request with the mailing of the court-approved payment program forms. Such coordination will reduce the cost of data collection. It may increase the response rate as well, since claimants will be solicited only once for detailed information.

#### *5. Assistance for Claimants in Filling Out Forms*

Claimants are likely to have questions about the forms and may need help in completing them. Methods should be developed to aid claimants in completing the application forms. Such assistance will involve some initial expense, but it will increase the completeness and accuracy of the data submitted. Provision

of assistance thus will help assure that qualified claimants get the benefits for which they are eligible, and will reduce processing and evaluation costs for the settlement fund. Understandable, step-by-step instructions will do much to eliminate confusion and ensure accurate data collection.

A toll-free telephone number will be provided for claimants who need further assistance. This service will be staffed by trained people who can answer questions about the application forms. Sufficient telephone lines should be used so that claimants can get through to operators without undue delay. Because the toll-free number is likely to be very busy at times, arrangements will be made for an answering tape with basic information and referral numbers to aid callers, who then can wait for the first available operator if the tape does not provide sufficient

information.

The existing national network of veteran service representatives also should be utilized. These service representatives, usually employed by state veteran affairs departments, already help veterans complete information requests from government agencies. A training manual will be developed on how to complete the Agent Orange application forms. This manual will be distributed to all service representatives and to other government agencies, and private organizations that regularly counsel Vietnam veterans. In addition, a series of briefing sessions should be scheduled around the country to inform interested representatives about how to complete the application forms.

The combination of clear instructions, a toll-free telephone number and a network of trained service representatives should

eliminate much of the confusion involved in seeking detailed information from such a large, diverse group. In addition, any other cost-effective means to assist claimants in completing the application forms will be explored.

B. Overall Structure and Financial Matters.

1. Minimizing Adverse Tax Consequences

An important objective of the distribution plan is to maximize the amounts available for disposition. Because the settlement fund will be invested and disbursed over a period of many years, it is important to minimize the negative impact of federal, state and local income taxes on the earnings and gains realized by the fund. Another important goal is to ensure that payment program awards and class assistance foundation grants are exempt from taxation.

Adverse tax consequences will be minimized by seeking an Internal Revenue Service ruling of tax exemption under section 501(c)(3) of the Internal Revenue Code of 1954, as amended, as a charitable organization that serves a public purpose.

Awards from the payment program should be treated as exempt from tax. See, e.g., I.R.C. sec. 104(a)(2) (tort recoveries are not "income"). Similarly, indirect benefits received by class members from the foundation should be designed in a way to avoid being treated as taxable income.

## 2. Investment

Among the most important responsibilities in administering the settlement programs are protecting and managing the assets of the settlement fund. The principal decision that must be made is the selection of an investment manager or investment managers who will be responsible for investing the fund. The

court will make this selection after consulting Special Master Feinberg, the Special Master for Investment Policy, Richard J. Davis, the foundation board of directors and the payment program advisory group.

Special Master Davis has already commenced the process of identifying capable and interested investment managers. See Special Master's Report, pp. 599-618. On February 1, 1985, Special Master Davis sent a detailed request for further information to a number of investment managers who previously had indicated an interest in managing the fund. This request for information asked the investment managers to describe how they would propose to invest the assets of the fund. The request for information also asked a series of questions about the financial institution's experience, performance, ability to adjust investment

strategy, and other matters related to the institution's ability to provide service to the fund. In addition, questions were asked about the institution's costs and fees.

Based on the written submissions in response to the questionnaire, Special Master Davis has indicated that he expects to select between four and six finalists. In coordination with Special Master Feinberg, Special Master Davis will interview the finalists, and consult with the payment program advisory group and the foundation board of directors with respect to the interviews. After the interviews, the Special Masters will recommend an investment manager or investment managers to the court. The court will approve or disapprove the selection after consulting the payment program advisory group and foundation board of directors. It may well be desirable to set up the payment program

disbursing agency in the form of an insurance company with power to invest the program's \$150 million fund. If so, adequate protection of the fund's security will need to be provided.

As noted *supra* Part V.C. once the distribution plan is fully operational, the class assistance foundation's endowment will be transferred to it. The board will make all subsequent investment decisions. If the board at any time decides to change investment managers, it will give advance notice in writing to the court before acting.

Investment strategy for both distribution programs should be guided by considerations of security, return on investment and flexibility. Those responsible for investment decisions should keep in mind that the assets of the fund belong to the class, and are being administered for the benefit of the

members of the class. Adequate bonding, auditing and insurance will be required.

### *3. Administrative Budgets*

The payment program and the class assistance foundation will be operated as efficiently and economically as possible. Administrative costs must be minimized so that members of the class receive the largest possible benefits of the settlement.

Most payment program expenses will be incurred in the early years when the largest influx of application forms will occur. The cost of administering the payment program should dwindle in the late years of the program.

In contrast, the cost of administering the class assistance foundation will be relatively constant throughout the entire 25-years of its operation under the distribution plan. Control of the foundation's administrative expenses, like

other aspects of administering the foundation, will be the responsibility of the board of directors and the executive director.

Because of uncertainties associated with both distribution programs, it is difficult to project the cost of administering them. Until more is known about the claims that will be submitted to the payment program, the size of the tasks that will have to be performed cannot be projected with precision. In addition, many tasks would be contracted to outside service providers. These services would be subject to a competitive bid process. See *supra* Part IV.H.1. The foundation's administrative expenses will depend on what the board of directors determines the foundation should do. At least some of the services it funds might also be subject to competitive bidding. See *supra* Part V.E.2.a. The Special Master's Report

provides some tentative and preliminary cost projections. See Special Master's Report, pp. 619-23.

#### 4. Audits

Throughout the life of the distribution programs, one or more accounting firms will conduct an independent audit at least annually of all aspects of the programs, including investment of the settlement fund, operation of the payment program, and operation of the class assistance foundation. The board of directors will select the accounting firm that will conduct future independent audits of the foundation. The court may require further independent audits of the foundation by a court-appointed accounting firm.

Audits will include a review of financial transactions to determine whether the financial reports fairly represent the current financial position of the programs and changes in that

financial position. They also will include an analysis of whether the distribution programs are operating in an efficient, economical and effective manner. Reviews will encompass the operations of the major contractors and the investment program, as well as the distribution programs. The reports will be submitted to the court and will be docketed as part of the court record, where they will be available to class members and to the public.

*C. Role of the Special Master and  
Implementation Schedules*

The Special Master will have an important role in readying the distribution plan for implementation. Accordingly, Special Master Kenneth R. Feinberg's appointment as Special Master will continue on a contract basis until such time as the distribution plan has been implemented and is fully operational. Among other things, the Special Master

will oversee the planning and development of the payment program. He will consult with the advisory group of Vietnam veterans that will be appointed by the court. See *supra* Part IV.H.B. The Special Master also will establish the class assistance foundation and seek tax-exempt status for the foundation. See *supra* Part V.B.1. The foundation board of directors will be consulted.

Establishing an implementation schedule requires a balance to be struck between competing objectives. One of the advantages of a settlement in any lawsuit is that plaintiffs can receive funds sooner and avoid the uncertainty and lengthy delays involved in litigating the case to a final judgment. Development and implementation of a plan for distribution of a settlement fund thus should proceed as expeditiously as possible, so that the plaintiffs can begin to benefit from the

settlement. See *In re "Agent Orange" Product Liability Litigation*, 597 F.Supp. 740, 858 (EDNY 1984).

Formulation of a fair and equitable distribution plan in this case has required careful and extended consideration of numerous distribution proposals and resolution of many complex and difficult issues. Haste in establishing the \$200 million programs called for in the court's distribution plan could be expensive to the class, wasting funds that could otherwise be expended for the benefit of class members. Prompt but prudent action is the wisest course in making the payment program and class assistance foundation operational. The desirability of distributing the benefits of the settlement to the class as soon as possible cannot be allowed to obscure the equally important objective of operating the distribution programs in

an efficient, professional and cost-effective manner.

The Special Master recommended that the payment program and class assistance foundation be made operational within a reasonably short period of time - a year from the date of this opinion, if possible. Special Master's Report, p. 242. This target date is desirable and acceptable. All permissible preliminary steps toward making the distribution programs operational will be undertaken while appeals are pending so that delay in implementation is minimized. It is important to recognize, however, that because of the appellate process a definitive time schedule for implementation and the beginning of distribution operations cannot be fixed.

With these limitations in mind, the following schedule will govern implementation of the distribution plan.

It is based on sample schedules prepared by the Special Master. See Special Master's Report, pp. 591-98. The schedule incorporates the dual objectives of operating the settlement programs efficiently and professionally while distributing settlement benefits as expeditiously as possible. The dates used are not precise deadlines. They are set forth to demonstrate the tasks that need to be accomplished and to provide estimates of how long it should take to complete them.

#### *1. Payment Program*

The Special Master will immediately begin to assemble a detailed bid request to be sent to prospective contractors desiring to provide claim processing services. By June 30, 1985, the court will appoint a veterans advisory group. See *supra* Part IV.H.8. By August 1, 1985, a claim processor or claims processors

should be selected. See *supra* Part IV.H.1.

From August 1, 1985 through October 1, 1985, application forms and instructions should be prepared, approved by the court, and printed. An assistance manual should be prepared and disseminated to state veterans agencies and to veterans organizations. See *supra* Parts IV.H.2., IV.H.3. and VII.A.3.

By October 1, 1985, application forms will begin to be sent to claimants. Claimants will have 60 days from the date of mailing to complete and return the forms. Completed forms will be returned by January 1, 1986. See *supra* Parts IV.H.3. and VII.A.3. From November 1, 1985 through March 1, 1986, the returned claims will be analyzed and additional information needed in processing any of them obtained. Eligibility criteria and payment levels will be evaluated. By March 31, 1986, a report should be submitted to the court on

final eligibility proposals and projected payment levels. By April 15, 1986, the court should approve final eligibility and disability criteria and first payment levels. See *supra* Part IV.H.5.

Beginning on April 15, 1986, claims should be processed based on approved eligibility and disability criteria. By May 1, 1986, assuming that implementation has proceeded on schedule and all appeals have been completed, the first payments will begin going to qualified applicants. See *supra* Part IV.H.4.

## *2. Class Assistance Foundation*

By June 20, 1985, the court will appoint a search committee comprised of prospective members of the foundation board of directors. The committee will seek and evaluate candidates for executive director of the foundation. See *supra* Part V.B.3.

By August 1, 1985, the Special Master should establish the foundation, and the

court should appoint the board of directors and the executive director. See *supra* Part V.B. The board should submit a comprehensive plan for foundation operations to the court by April 1, 1986. Payments by the foundation can begin by May 1, 1986 if all appeals have been completed.

### *3. Annual Operating Schedules*

Once implemented, the distribution programs will operate on regular annual schedules. Sample schedules are set out in the Special Master's Report. See Special Master's Report, pp. 594, 597-98.

## VIII. CONCLUSION

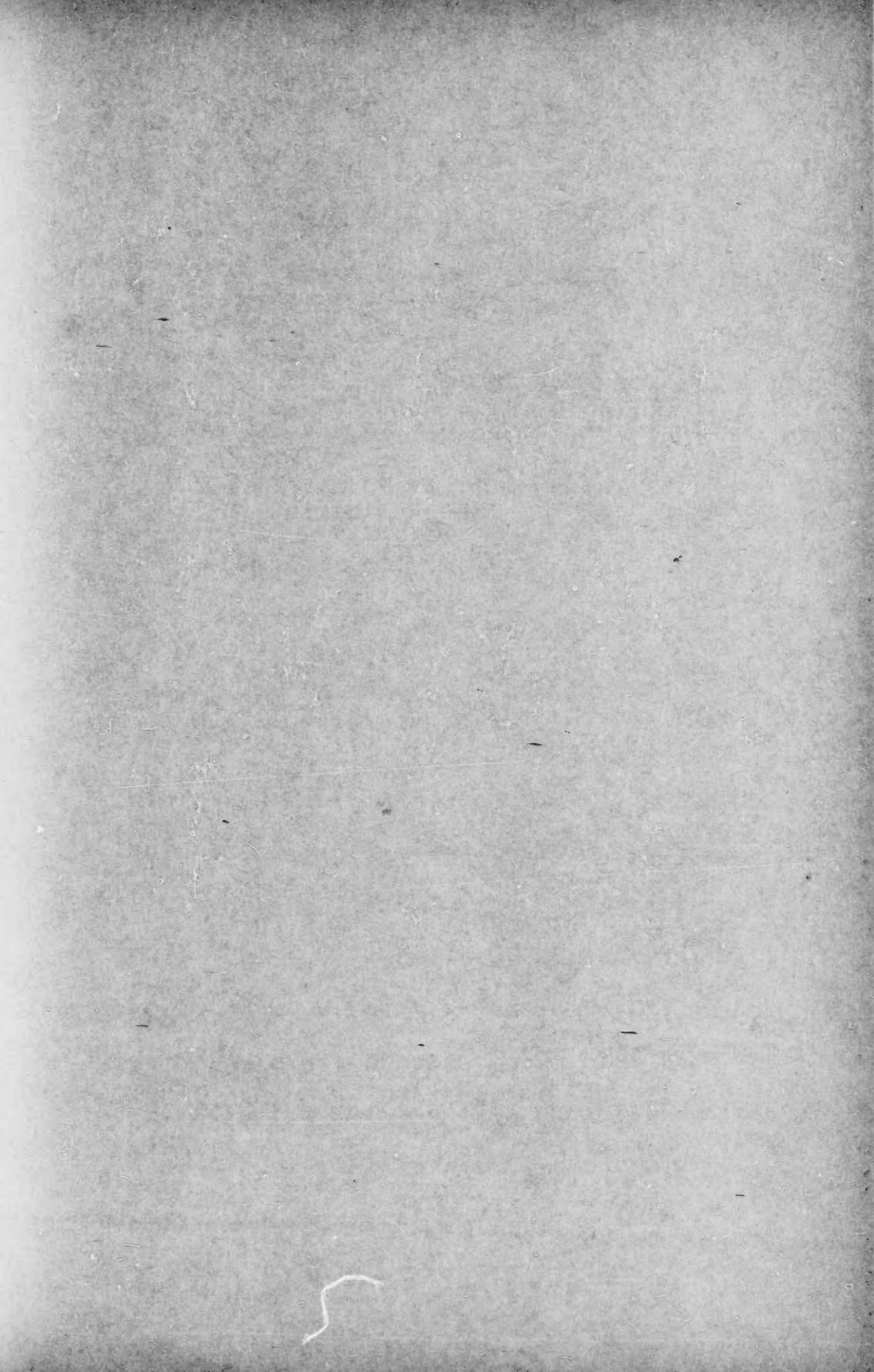
The settlement fund will be distributed according to the plan set forth in this opinion. Distribution of the fund is stayed pending completion of appeals. No cash payments to individual claimants can be made and no services can be funded until the appellate process has concluded.

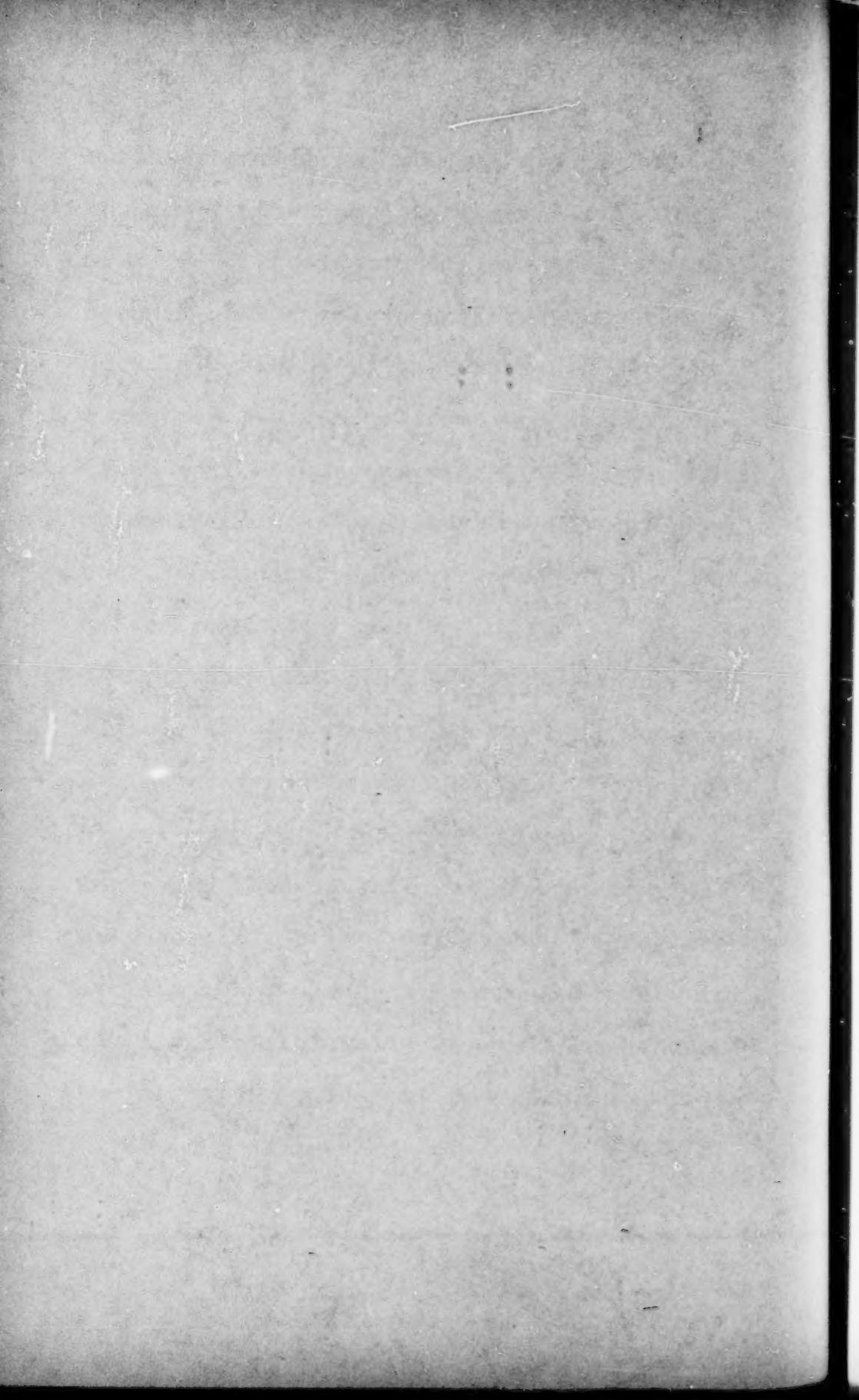
During the interim, subject to control by the court, the Special Master will solicit bids from contractors for the payment program, enter into contracts conditioned upon the outcome of the appellate process, establish the foundation and apply for tax-exempt status, develop and mail out payment applications, analyze the returned data, and adjust payment and eligibility criteria.

Necessary and incidental expenses of administering the settlement fund in these and other respects will be paid on court order out of the settlement fund. Contracts entered into, to the extent of performance prior to any appellate decision, and payments made pursuant to court approval, shall be valid whatever the ultimate outcome of any appeals.

SO

ORDERED.





**APPENDIX I**

**(818 F.2d 179)**

**In re "AGENT ORANGE" PRODUCT  
LIABILITY LITIGATION  
MDL NO. 381.**

**Nos. 328, 306 and 329-331. Dockets  
86-3039, 86-3042, 86-6171, 86-6173  
and 86-6174.**

**United States Court of Appeals,  
Second Circuit.**

**Argued Oct. 1, 1986.**

**Decided April 21, 1987.**

**Before VAN GRAAFEILAND, WINTER,  
and MINER, Circuit Judges.**

**WINTER, Circuit Judge.**

This opinion addresses challenges by the Plaintiffs' Management Committee ("PMC") and by certain plaintiffs represented by Victor Yannaccone to Chief Judge Weinstein's adoption of a plan for the distribution of the fund established as a result of the class settlement with the defendant chemical companies. See *In re "Agent Orange" Product Liability*

*Litigation*, 611 F.Supp. 1396 (EDNY 1985) ("Distribution Opinion"). Because no party to this litigation is adverse to the PMC, we requested that Special Master Kenneth Feinberg defend the district court's distribution order essentially in the role of an *amicus curiae*. A detailed discussion of the development and selection of the distribution plan appears in the first of this series of opinions, 818 F.2d 145 familiarity with which is assumed.

Certain plaintiffs represented by Mr. Yannaccone have also filed a petition for writ of mandamus or prohibition to have the PMC removed as class counsel. That issue is also addressed herein.

*1. The Timeliness of the Pending Appeals*

A party seeking to appeal a final decision of a district court in any case where, as here, the United States is a

party must file a notice of appeal within 60 days after entry of the decision. Fed.R.App.P. 4(a)(1). The notice of appeal filed by Mr. Yannacone is concededly untimely. That appeal is therefore dismissed.

The Special Master argues that the PMC's pending appeal is also untimely because it was noticed on August 19, 1986, more than 60 days after the distribution plan was adopted on May 28, 1985. However, important aspects of the distribution plan remained to be decided as of the earlier date, including, for example, the means of compensating veterans from Australia and New Zealand, 611 F.Supp. at 1443-45; the criteria for establishing a claimant's exposure to Agent Orange, *id.* at 1417; and the entities that were to implement and administer the individual payment program, *id.* at 1427. Moreover, Chief

Judge Weinstein apparently did not view the entire distribution plan as final until July 31, 1986, when he entered an order pursuant to Fed.R.Civ.P. 54(b) designed to "constitute a final judgment upon this Court's Distribution Opinion of May 28, 1985.

We do not believe that appellants were faced with the choice of appealing from the May 28 order or not at all. Whether that order was appealable is of great doubt. It was not a collateral order that "did not make any step toward final disposition of the merits of the case and will not be merged in final judgment," *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546, 69 S.Ct. 1221, 1225, 93 L.Ed. 1528 (1949). Unlike such a collateral order, the May 28 order could be effectively reviewed as part of the final judgment. *Id.* See also *Coopers & Lybrand v.*

*Livesay*, 437 U.S. 463, 468, 98 S.Ct. 2454, 2457, 57 L.Ed.2d 351 (1978); *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156, 171-72, 94 S.Ct. 2140, 2149-50, 40 L.Ed.2d 732 (1974).

Even if the May 28 order was appealable under *Cohen*, there is still no reason to bar an appeal from the July 31 order, which was clearly intended by the district court to be final. See 15 C.Wright, A.Miller & E.Cooper, *Federal Practice & Procedure*, sec. 3909, at 452 n.38 (1976) ("There is often little reason to deny review on appeal from a clearly final judgment on the theory that an earlier ordr that did not terminate the entire proceeding was nonetheless so final as to have been appealable. Doctrines designed to facilitate intermediate appeals to avoid hardship often do not serve any corresponding interest in protecting

opposing parties and the courts against delayed appeals."). *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 70 S.Ct. 322, 94 L.Ed. 299 (1950), is a rare case in which the Supreme Court dismissed an appeal on the ground that it should have been filed prior to the entry of final judgment. The instant case is distinguishable from *Dickinson* in at least two respects, however. First, the order that would have been appealable in *Dickinson* dismissed all claims raised by the appellant. The Court thus noted that the appellant's interests "could not possibly have been affected" by any action that remained to be taken by the district court. *Id.* at 515, 70 S.Ct. at 325. In contrast, the plaintiffs here continued to have an active interest in the litigation after the May 28 decision. Second, the Court recognized in *Dickinson* that the case

had arisen before the adoption of Rule 54(b), a provision with the "obvious purpose" of "reduc[ing] as far as possible the uncertainty and the hazard assumed by a litigant who either does nor does not appeal from a judgment of the character we have here." *Id.* at 512, 70 S.Ct. at 324. the Court therefore expressly refused to "try to lay down rules to embrace any case but this." *Id.*

Accordingly, we conclude the PMC's appeal from the district court's distribution plan was timely filed. We therefore need not consider the PMC's petition for a writ of mandamus, which raises the same issues.

## 2. General Principles

District courts enjoy "broad supervisory powers over the administration of class-action settlements to allocate the proceeds among the claiming class members ... equitably." *Beecher v. Able*,

575 F.2d 1010, 1016 (2 Cir. 1978). In reviewing allocations of class settlements, therefore, we will disturb the scheme adopted by the district court only upon a showing of an abuse of discretion.

In the present case, a relatively modest settlement fund must be allocated equitably among a large and diverse group of claimants. There are 240,000 claimants dispersed throughout the United States, Australia, and New Zealand. They suffer from an immense variety of ailments and have different medical and financial needs. Having pursued a number of often inconsistent goals in this litigation, they are as sharply divided over the distribution of the settlement fund as they are over its adequacy. The PMC seeks what it regards as a conventional scheme for "tort-based" recovery by individuals;

Mr. Yannaccone's clients want the fund devoted largely to establishing a foundation; the district court adopted a compensation based scheme to distribute the bulk of the fund with the remainder to be used to establish a foundation.

See P. Schuck, *Agent Orange on Trial* 211-13, 220 (1986).

The district court was not bound to choose among only those plans offered by class members who spoke out. Rather, it had to "exercise its independent judgment to protect the interests of class absentees, regardless of their apparent indifference," *In re Traffic Executive Association - Eastern Railroads*, 627 F.2d 631, 634 (2 Cir. 1980), as well as to protect the interests of more vocal members of the class. The district judge therefore had discretion to adopt whatever distribution plan he determined to be in

the best interests of the class as a whole notwithstanding the objections of class counsel, see, e.g., *Distribution Opinion*, 611 F.Supp. at 1409 (criticizing distribution plan proposed by PMC on ground that "too great a share of the fund would go to lawyers and medical experts"); *Plummer v. Chemical Bank*, 668 F.2d 654, 659 (2 Cir.1982) (district courts cannot rely solely on "the arguments and recommendations of counsel" in evaluating propriety of class settlements), or of a large number of class members. See *TBK Partners, Ltd v. Western Union Corp.*, 675 F.2d 456, 462 (2 Cir. 1982) (holding in shareholders' derivative suit that even "majority opposition ... cannot serve as an automatic bar to a settlement that a district judge after weighing all the strengths and weaknesses of a case and the risks of litigation, determines to

be manifestly reasonable"). See also *Cotton v. Hinton*, 559 F.2d 1326 (5 Cir. 1977) (approving settlement over objections of counsel purporting to represent almost 50 percent of class); *Bryan v. Pittsburgh Plate Glass Co.*, 494 F.2d 799 (3 Cir.) (approving settlement over objections of almost 20 percent of class), cert denied, 419 U.S. 900, 95 S.Ct. 184, 42 L.Ed.2d 146 (1974).

### 3. Choice of Law

In adopting a distribution plan that departed from traditional tort principles by not requiring "a particularized showing of individual causation and injuries," 611 F.Supp. at 1402, the district court held that such a plan would be consistent with "the consensus of state law," *id.* at 1403, that figured in its certification of a class action. *In re "Agent Orange" Product Liability Litigation*, 100 FRD

718 (EDNY 1983).

In the mandamus proceeding, we expressed "considerable skepticism" as to whether such a consensus would emerge among the states with respect to the legal rules applicable to the plaintiffs' claims. *In re Diamond Shamrock Chemicals Co.*, 725 F.2d 858, 861 (2 Cir.), cert denied, 465 U.S. 1067, 104 S.Ct. 1417, 79 L.Ed.2d 743 (1984). In the first of this series of opinions we have stated that the district court's conclusion as to the national consensus was to be praised more for its analysis than for its utility as a predictor of what various courts would do.

However, our disagreement with use of the national consensus in certifying a class does not foreclose its use as a method of establishing criteria for distributing a class settlement fund. As

another Court of Appeals has observed in the class action context, "the allocation of an inadequate fund among competing complainants is a traditional equitable function, using 'equity' to denote not a particular type of remedy, procedure, or jurisdiction but a mode of judgment based on broad ethical principles rather than narrow rules."

*Curtiss-Wright Corp. v. Helfand*, 687 F.2d 171, 174 (7 Cir. 1982) (citation omitted) (citing *Zients v. LaMorte*, 459 F.2d 628, 630 (2 Cir. 1972)). Use of a single national standard, regardless of what law various courts might have chosen in Agent Orange cases, is a permissible method of disbursing the fund. An individual claimant state-by-state approach would seriously deplete the portion of the fund going directly to veterans by diverting a substantial amount to lawyers and to the

adjudicators necessary to implement the PMC's complex scheme. The diversion might be so great as to reduce benefits for all claimants, including those who would be subject to the most favorable state laws. We thus agree with the approach of the district court on this question, although on a different rationale.

#### *4. Payments for Death or Disability of Exposed Veterans*

The PMC contends that the district court abused its discretion in compensating individual disabled veterans without requiring "a particularized showing of individual causation and injuries." 611 F.Supp. at 1402. The PMC argues that a portion of the settlement fund will thereby be distributed to undeserving claimants whose injuries were not caused by Agent Orange. Even if that outcome is the case, we do not believe that it is a grounds for altering the distribution scheme.

Chief Judge Weinstein did not deem necessary proof that a veteran's death or disability resulted from exposure to Agent Orange<sup>1</sup> because he found the available evidence insufficient to establish which non-traumatic injuries could have been caused by Agent Orange and which could have been caused by Agent Orange and which not. In other words, as between exposed veterans suffering from diseases for which the PMC would provide compensation and the exposed veterans suffering from other nontraumatic diseases, the district court concluded that the former had no stronger claim for benefits than the latter because "causation cannot be shown for either individual claimants or individual diseases with any appropriate degree of probability." 611 F.Supp. at 1409.

Chief Judge Weinstein did not abuse his discretion in adopting a distribution plan that reflected this conclusion. He was not obligated to adopt a plan that conformed to a theory of the relationship between Agent Orange and certain diseases that has little or no scientific basis. Further, he could take into account the very substantial countervailing evidence that Agent Orange was not harmful to any personnel in Vietnam. See *In re "Agent Orange" Product Liability Litigation*, 597 F.Supp. 740, 782-95 (EDNY 1984) ("Settlement Opinion") (reviewing scientific data on effects of Agent Orange and concluding that "all that can be said is that persuasive evidence of causality has not been produced"). He could also consider the substantial difficulty of proving that any particular plaintiff was injured by Agent Orange in making an

equitable allocation of the limited settlement fund. See *Curtiss-Wright Corp.*, 687 F.2d- at 174-75 (equitable allocation of a class action settlement fund may be accomplished over party's objection without "resolv[ing] trial-type issues of liability" based on district court's independent "weigh[ing of] the relative deservedness" of claimants). Moreover, he was correct in seeking a distribution scheme governed by criteria that are relatively easy and inexpensive to apply.

Furthermore, as became clear at oral argument, the PMC itself would not longer require proof that a veteran was actually exposed to Agent Orange in order to qualify a claimant for benefits under its distribution plan. Thus, servicepersons who spent their entire tour of duty far away from sprayed areas could receive payments under the PMC

plan merely be developing any of the 24 medical conditons that the PMC claims are associated with Agent Orange. In contrast, the district court's plan would require some evidence of exposure.<sup>2</sup> Even if the district court's distribution plan is overbroad with regard to ailments, that fact hardly renders it less desirable than the PMC's plan, which is clearly overbroad with regard to exposure.

We further note that the distribution plan adopted by the district court does not entirely disregard traditional tort principles of causation. For example, it provides payments only to veterans who have become disabled from non-traumatic, non-accidental, non-self-inflicted causes and to the survivors of veterans who have died from such causes. Consequently, a veteran who died or became disabled as a result of an auto

collision, a gunshot wound, or a narcotic overdose, all causes clearly unrelated to Agent Orange exposure, would have no claim to payments from the settlement fund.

In sum, given the inconclusive state of the scientific evidence as to what injuries, if any, were caused by Agent Orange, the district court did not abuse its discretion in holding that all exposed veterans who have suffered nontraumatic death or disability have stated "colorable legal claims against defendants ... [sufficient] to allow the to share in the settlement fund." *In re Chicken Antitrust Litigation American Poultry*, 669 F.2d 228, 238 (5 Cir. 1982), quoted in *Distribution Opinion*, 611 F.Supp. at 1411.

We emphasize that the district court is free to alter the distribution plan in the future to simplify it even more

or to clarify standards as concrete issues arise. We also ask the district court to review its procedures for establishing exposure to Agent Orange in light of Attachments 2 and 3 to the PMC's reply brief and recent news reports concerning the possible discovery of a biological "fingerprint" left in veterans' blood by dioxin. See Researchers Report Finding Teltale sign of Agent Orange, N.Y. Times, Sept. 18, 1986, sec. A at 28, col. 3 (late city final ed.).

#### *5. Class Assistance Programs*

We turn to the district court's proposal to establish "a class assistance foundation ... to fund projects and services that will benefit the entire class." 611 F.Supp. at 1432. the PMC contends that use of the settlement fund for class assistance programs would contravene the decisions

of this court in *Eisen v. Carlisle & Jacqueline*, 479 F.2d 1005 (2 Cir. 1973), vacated and remanded on other grounds, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974) (remedy proposed before finding of liability in order to make class manageable; rejected because it benefitted future odd-lot investors rather than past investors who had suffered loss, and *Van Gemert v. Boeing Co.*, 533 F.2d 812 (2 Cir. 1977) (rejecting proposal that would have permitted unclaimed portion of damage award to be paid to class members who had already been made whole).

We do not believe that the district court was necessarily foreclosed by *Eisen* and *Van Gemert* from using a portion of the settlement fund to provide programs for the class as a whole. The instant case is, of course, distinguishable from *Eisen* and *Van Gemert* in several

important respects.

First, the class that will benefit from the district court's distribution plan is essentially equivalent to the class that claims injury from Agent Orange. That was not the case in either *Eisen* or *Van Gemert*. In *Eisen*, the proposed recovery scheme would primarily have benefitted not the class of persons who claimed injury from prior odd-lot transactions but instead a class of persons who would engage in such transactions in the future. In *Van Gemert*, the proposal at issue would have distributed the unclaimed portion of a damage award to class members who had already recovered their losses in full, a group the court characterized as a "next best class." 553 F.2d at 815. Hence, the distribution plan adopted by Chief Judge Weinstein simply lacks the sort of "fluidity" between the class claiming

injury and the class receiving recovery  
that existed in *Eisen* and *Van Gembert*.

Second, we were particularly concerned in *Eisen* that the availability of "fluid class recovery" would have allowed plaintiffs to satisfy the manageability requirements of Rule 23 where they otherwise could not. The damages to the average class member in *Eisen* were estimated at no more than \$3.90, see 479 F.2d at 1010, and, as counsel for the named plaintiff conceded, "[i]f each [member] had to present his own personal claim for damages, the class, indeed, would not be manageable." *Id.* at 1017. We foresaw that such an unwarranted relaxation of the manageability requirements would have induced plaintiffs to pursue "doubtful" class claims for "astronomical amounts" and thereby "generate ... leverage and pressure on

defendants to settle." *Id.* at 1019. However, the instant case, unlike *Eisen*, was maintainable as a class action regardless of the form of recovery available to the plaintiff class. Accordingly, our concern in *Eisen* that the availability of a particular form of recovery would vastly enlarge the number of class actions in the federal courts is not present in the instant case.

Finally, the instant case, unlike *Eisen* and *Van Gemert*, arises out of a pretrial settlement. As the Supreme Court has recognized, a district court may "provide[] broader relief [in an action that is resolved before trial] than the court could have awarded after a trial." *Local Number 93, International Association of Firefighters v. City of Cleveland*, 106 S.Ct. 3063, 3077, 92 L.Ed.2d 405 (1986). Indeed, we have previously recognized that some

"fluidity" is permissible in the distribution of settlement proceeds. See *Beecher v. Able*, 575 F.2d at 1016 n. 3; *West Virginia v. Chas. Pfizer & Co., Inc.*, 314 F.Supp. 710, 728 (SDNY 1970), aff'd, 440 U.S. 1079 (2 Cir.), cert denied, 404 U.S. 871, 92 S.Ct. 81, 30 L.Ed.2d 115 (1971).

We thus conclude that a district court may, in order to maximize "the beneficial impact of the settlement fund on the needs of the class," 611 F.Supp. at 1431, set aside a portion of the settlement proceeds for programs designed to assist the class. However, we believe that the district court must in such circumstances designate and supervise, perhaps through a special master, the specific programs that will consume the settlement proceeds. The district court failed to do so in the instant case. Instead, it provided that

the board of directors of a class assistance foundation would control, *inter alia*, "investment and budget decisions, specific funding priorities, ... [and] the actual grant awards," *id.* at 1435, and that the court would retain only "[a] comparatively modest supervisory role" in such decisionmaking. *Id.* at 1436.

We are unwilling for several reasons to permit the distribution of any settlement proceeds to a largely independent foundation. First, while a district court is permitted broad supervisory authority over the distribution of a class settlement, see *Beecher v. Able*, 575 F.2d at 1016, there is no principle of law authorizing such a broad delegation of judicial authority to private parties. We perceive no assurance that the "self-governing and self-perpetuating" board of directors of

the class assistance foundation, or any other such body that might be devised by the court, will possess the independent, disinterested judgment required to allocate limited funds to benefit the class as a whole. One of the district court's prime functions in distributing such a fund is to protect the less vocal and less activist members of the class. The proposed foundation is not well designed to perform that function. Moreover, given the very evident discord among various veterans as to the use of the settlement fund, we see great hazards in transferring that discord to a foundation having permanent control over portions of that fund. There is a great danger that the fund would be expended in ways that generate more controversy than benefits and would create even more frustration among a group already frustrated enough by

perceived political and legal setbacks. However unique it may be, this is an action for personal injuries, and we believe that only direct judicial supervision can assure that the settlement fund is expended for appropriate purposes.

We acknowledge the strong sentiment among some veterans for the creation of such a foundation. We also note, however, their great expectations for the foundation are similar to the expectations that prompted this class action litigation. Those latter expectations were frustrated when confronted wth the reality of legal proceedings. Great expectations underlying the foundation proposal still exist because the concrete tasks to be undertaken by it remain unclear, and the reality of hard and controversial choices concerning use of the fund has

not yet been confronted.

Moreover, we are concerned that the broad mandate given the class assistance foundation, which must remain an arm of the court however loosely connected, would permit settlement proceeds to be expended on activities inconsistent with the judicial function. For example, activities to "help class member veterans better obtain and utilize VA services" and to "increase public awareness of the problems of the class," *id.* at 1440, might include political advocacy. We do not believe that the proceeds of a court-administered settlement ought to be used for such a purpose.

Finally, we are concerned that, even given the expressed intention to allow the foundation great latitude, the district court and this court would repeatedly be asked to intervene in

foundation decisions alleged not to benefit the class. When such claims are made, they call for greater scrutiny than is contemplated by the district court's exercise of only a "modest supervisory role." In addition, endless legal argument over the disbursement of the settlement fund would simply prolong the suffering and frustrations of the class.

We explicitly note, however, that the district court may in the exercise of its discretion and after consultation with veterans' groups undertake to use portions of the fund for class assistance programs that are consistent with the nature of the underlying action and with the judicial function. Accordingly, the district court on remand may designate in detail such programs and provide for their supervision. A reserve fund for as yet

undefined programs may be established. Alternatively, the court may reallocate any or all of the funds earmarked for the class assistance foundation to augment the awards to individual class members. The court may choose either to increase the awards to disabled veterans and the survivors of deceased veterans or to provide awards to other class members who have suffered less than total disability.

*6. Yannacone Petition for Writ of  
Mandamus/Prohibition*

The petition for writ of mandamus or prohibition filed by Mr. Yannacone seeks the removal of the PMC as lead counsel. Mr. Yannacone contends that a "conflict of interest" exists between the PMC and the plaintiff class, as evidenced by the differences between the distribution plan submitted by the PMC and the plan submitted by Mr. Yannacone. He also

argues that the plaintiffs are entitled to "a reasonable opportunity to be heard through counsel of their own choosing who can and will speak independently on their behalf." The petition is frivolous.

We note that Mr. Yannacone was among the attorneys who first sought class certification and that he served for some time as the lead counsel for the class. Nevertheless, his present petition reveals a fundamental misunderstanding of the nature of a class action. A plaintiff who joins in a class action, as many plaintiffs did through Mr. Yannacone, gives up his or her right to control the litigation in return for the economies of scale available under Fed.R.Civ.P. 23. In the related context of a shareholder's derivative suit, we have rejected any notion that "each individual plaintiff and lawyer must be

permitted to do what he pleases in litigation as complex as this, and can behave in total disregard of the interest of other litigants and of the class. *Farber v. Riker-Maxson Corp.*, 442 F.2d 457, 459 (2 Cir.1971) (per curiam).

The selection of lead counsel for the plaintiff class is left to the discretion of the district court "guided by the best interests of [the class], not the entrepreneurial initiative of the named plaintiffs' counsel." *Cullen v. New York State Civil Service Commission*, 566 F.2d 846, 849 (2 Cir. 1977). "Unless there are exceptional circumstances, ... the exercise of discretion should be left untouched by the appellate court." *Id.* See also *Weight Watchers of Philadelphia, Inc. v. Weight Watchers International, Inc.*, 45 F.2d 770, 775 (2 Cir.1972) ("we do not - indeed may not - issue mandamus with respect to orders

resting in the district court's discretion, save in most extraordinary circumstances'" (quoting *Donlon Industries Inc. v. Forte*, 402 F.2d 935, 937 (2 Cir. 1968)).

Mr. Yannacone has failed even to suggest, much less establish, any "exceptional circumstances" that might warrant removal of the PMC as lead counsel. Indeed, he has suggested nothing more than a difference of opinion between the PMC and himself with respect to the appropriate distribution of the settlement fund. Moreover, these differences were fully aired before the district court, which thoroughly evaluated the merits of each plan in the course of its distribution opinion. See 611 F.Supp. at 1403-10.

Finally, even if we were to order the removal of the PMC as lead counsel, we have no reason whatsoever to expect the

district court to appoint Mr. Yannacone to take its place. We have even less than no reason to expect the district court to abandon its own distribution plan in favor of the plan proposed by Mr. Yannacone. Accordingly, the petition is denied.

Affirmed in part, reversed in part, and remanded for further proceedings in accordance with this opinion.

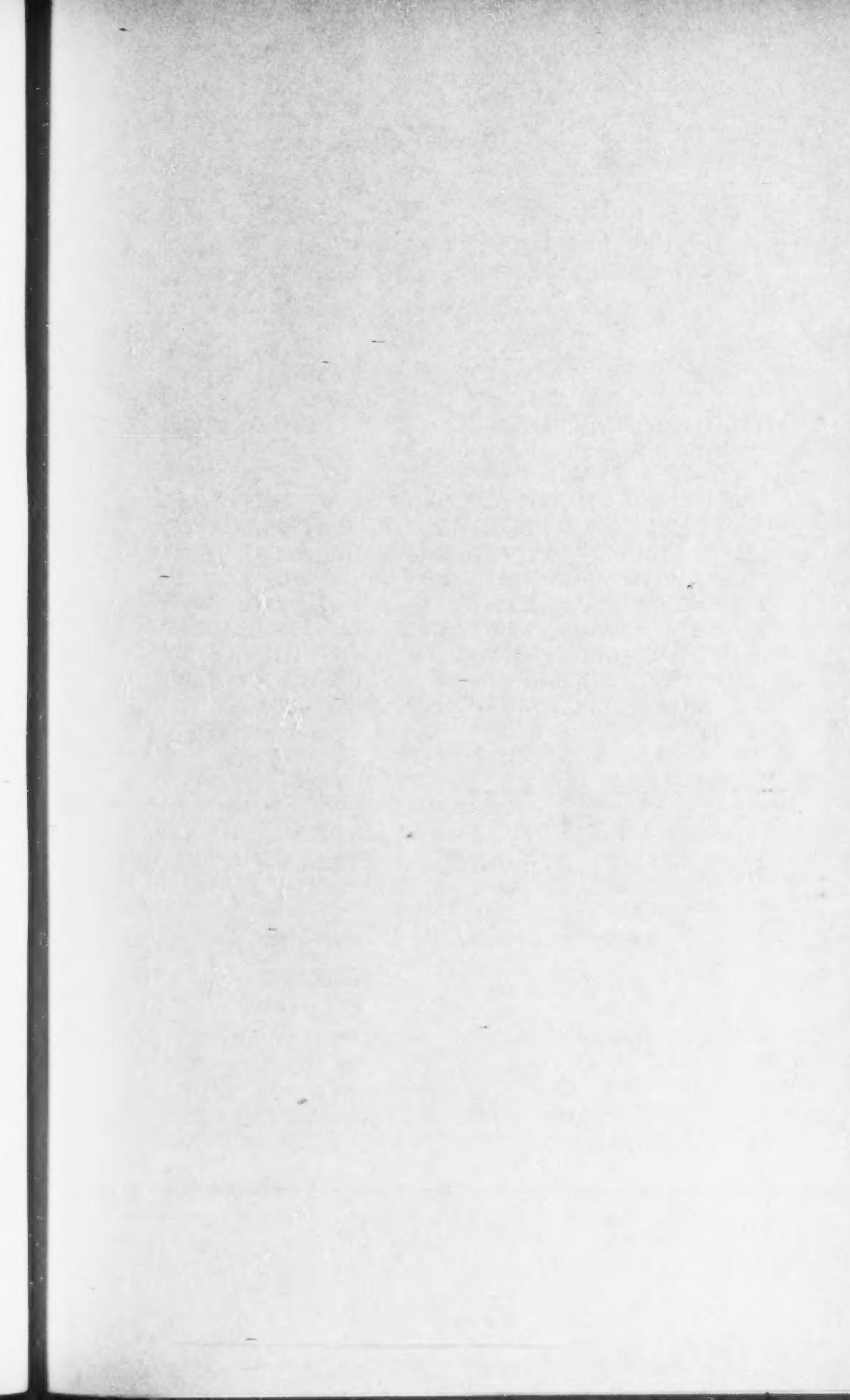
**Footnotes:**

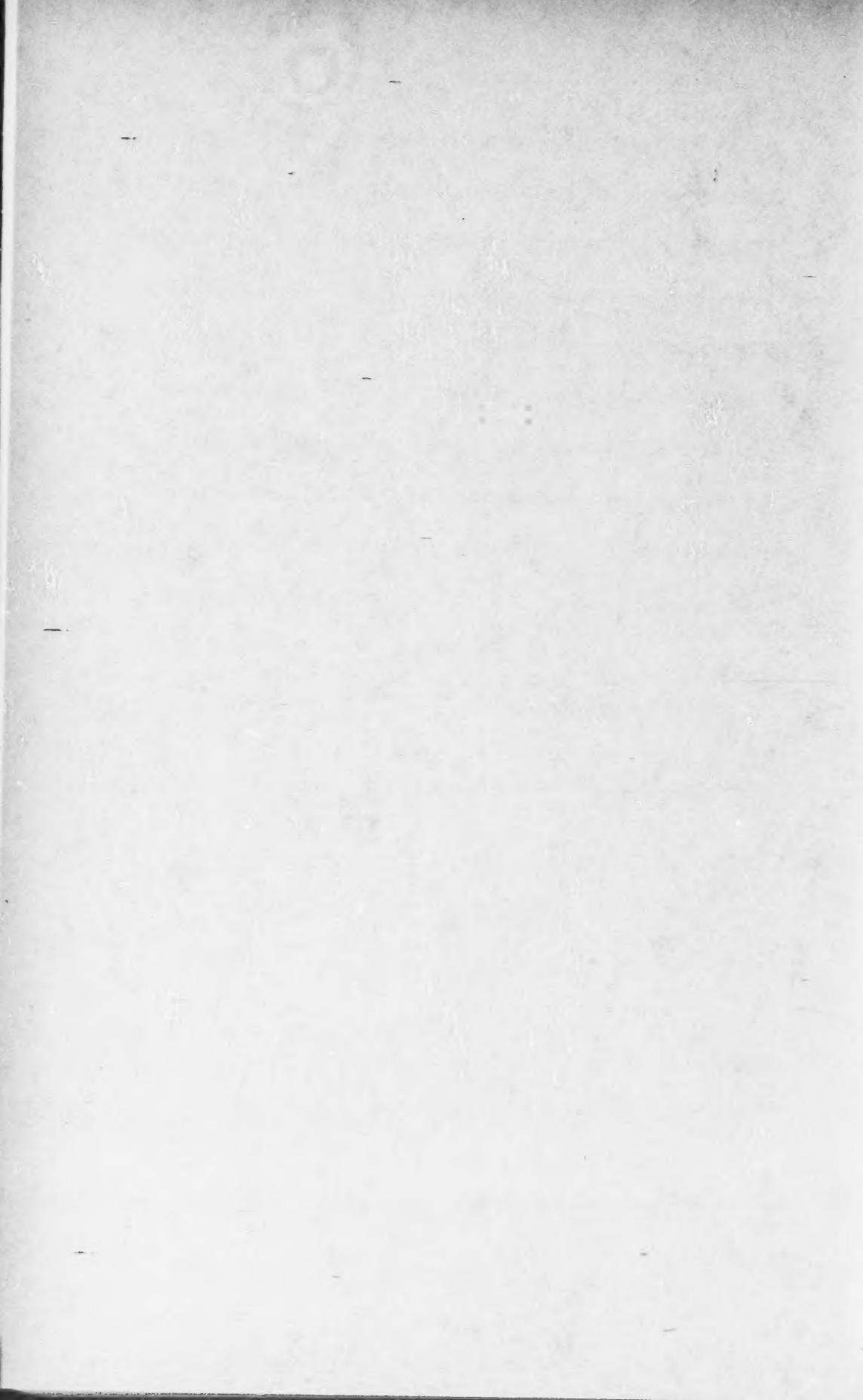
1. The court adopted the Social Security Act's definition of "disability", namely an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. sec. 423(d)(1)(A) (1982). The court provided that "[a]ny veteran claimant certified as disabled by the Social Security Administration will be considered disabled for purposes of the payment program, unless the disability was predominantly caused by a traumatic, accidental or self-inflicted injury." 611 F.Supp. at 1413. A claimant who has not been found disabled by the Social Security Administration may still

qualify for payments by submitting satisfactory medical evidence to the disbursing authority; in such cases, "the payment program will take into account, as evidence, a Social Security determination that the veteran is no disabled, or certifications of disability from other entities such as the Veterans Administration or private insurers." *Id.*

2. The plan would require a claimant to make "[s]ome substantial showing of exposure" to Agent Orange, 611 F.Supp. at 1415, by demonstrating that he held a job involving direct handling or application of Agent Orange," *id.* at 1416, or that he "was present in a sprayed area when the spraying occurred" or in or near such an area within some specified period thereafter, *Id.* at 1417. the court would rely primarily on the HERBS tape, a computerized record of

herbicide dissemination missions in Vietnam, to determine the exposure of ground troops to Agent Orange. However, "[b]ecause the HERBS tape does not account for all possible exposures," veterans who could not establish exposure on the basis of the HERBS tape would be able to present alternative evidence of exposure to "an independent board of review." *Id.*





APPENDIX III

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

\* \* \*

IN RE: "AGENT ORANGE"]  
PRODUCTS LIABILITY ] MDL NO. 381  
LITIGATION ] (ALL CASES)

PLAINTIFF'S AMENDED MOTION TO THE COURT  
TO RECONSIDER FINDINGS OF JUDGE PRATT IN  
PRE-TRIAL ORDER NO. 51, DATED MAY 20,  
1983, TO THE EFFECT THAT ELEMENTS ONE  
AND TWO OF THE GOVERNMENT CONTRACTORS  
DEFENSE SHOULD BE FOUND, UNDER RULE  
56(d), IN FAVOR OF THE DEFENDANTS; THIS  
RELIEF IS SOUGHT WITH RESPECT TO THIS  
COURT'S GENERAL POWER TO RECONSIDER  
PRIOR MATTERS WHICH ARE NOT CONTAINED IN  
A FINAL ORDER, IT BEING THE POSITION OF  
THE COURT THAT NO "FINAL" ORDER OR  
JUDGMENT WAS ENTERED WITH RESPECT TO  
SUCH FINDINGS, AND/OR RELIEF IS SOUGHT  
UNDER RULE 60(b), F.R.C.P., FOR MODIFI-  
CATION OF PRIOR ORDERS OF THE COURT

COMES NOW the Plaintiffs and, with  
respect to the findings of Judge Pratt  
in Pre-Trial Order No. 51, dated May 20,  
1983, that elements one and two of the  
Government Contractors Defense would be  
determined in favor of the Defendants

pursuant to Rule 56(d) of the Federal Rules of Civil Procedure, would respectfully urge the Court to utilize its general power to reconsider and modify all prior, non-final orders of the Court, and/or should this Court deem such order to be in any respect "final", then to modify same pursuant to Rule 60(b), F.R.C.P., and for such motion would respectfully show unto the Court:

I.

\*\*\*\*\*

II.

EXAMPLES OF FACTUAL EVIDENCE BEARING  
UPON ELEMENTS ONE AND TWO  
OF THE GOVERNMENT CONTRACTORS DEFENSE

This Court has had the documents and testimony with respect to the Government Contractors Defense summarized, discussed and rediscussed on so many occasions that Plaintiffs will not burden this Court with a detailed

discussion of the evidence. Suffice it to say that, at least recently, there has been a substantial amount of evidence developed with respect to elements one and two, indicating quite clearly that there are at least fact issues about those elements. Some examples follow:

1. As we pointed out in our "Supplemental Reformulation" brief, at pp. 32-34, a sub-issue of the first element (whether or not the Government "established" and/or "approved" the specifications in question) is whether or not the specifications which the Government established imposed "minimal and very general requirements" with respect to the preparation of the specifications, the manufacturing of the products and the delivery of the product. See *McKay v. Rockwell*

International Corp., 704 F.2d 444 (9th Cir. 1983), and Merritt, Chapman, et al v. Guy F. Atkinson Co., 295 F.2d 14 (9th Cir. 1961). There is substantial evidence that it was the intention of the Government, and its conduct bears this out, that the Agent Orange program would impose only minimal and general requirements upon the Defendants. For example, at the first "Defoliation conference", held July 29-30, 1963 at the United States Army Biological Laboratories at Ft. Detrick, Mr. Albert E. Hayward, Chief of the Program Coordination Office, stated in a presentation for which official notes exist:

In a very real sense, this program is defoliation is a little bit unique with respect to the usual military-industrial collaboration. Ordinarily, in military R&D we have a military concept that leads to the statement of a military requirement,

technical characteristics, performance specifications, and other strictly delimited aspects. In this program we do not have rigidly specified characteristics. I have stated some of the broad requirements that a successful defoliating chemical should have, but within this general framework we will accept and use materials that will do a job for us. In a few years, it may be that we will come up with more definite specifications but at the moment we simply solicit the assistance of you gentlemen in finding materials that can be used successfully within the reasonably broad and general guidelines that General Delmore has stated and that I have repeated. (Emphasis added).

2. In addition, there is extensive evidence that the specifications issued by the Government had really been "established" by the Defendants, particularly the Monsanto Defendant, and that the Government exercised only minimal control over the formulation and manufacturing of the Agent Orange products. In other words, it is clear from the evidence that the Government

acquired the specifications for the Agent Orange product from "off-the-shelf" products of the Defendants. The following evidence indicates this:

a. Cecil Russell was the Director of Quality Control with Monsanto. He had the job of helping the government prepare the specifics for Agent Orange. In his deposition, he acknowledged that he had written a letter stating: "I wrote the existing military specifications on N-Butyl D and T and Orange 1." Although he later retreated from that position, when pressed upon cross-examination he admitted that, at the least, he "helped write the specifications."

b. As further corroboration of the foregoing, a memo dated February 22, 1963 was signed by Mr. Russell which had attached to it "ester Specifications for

United States Army Biological Laboratory." In the memo, Mr. Russell states that at the initial meeting with the military Mr. Bourland of the Government wanted know whether or not Russell would work with a Mr. Pearson on the specifications.

c. In another communication, dated February 8, 1963, Mr. Russell stated: "I was able to completely satisfy Mr. Bourland, who wanted me to first suggest a specification and an analytical method on the next blend which they will be receiving, and then work with their Mr. Pearson on writing the specifications covering this material. Mr. Pearson will be here 2-18-63."

Mr. Russell confirmed what Plaintiffs suspected and had been advised from other sources all along: the chemical companies actually prepared

the specifications for Agent Orange - not the Government. The importance of the Monsanto witnesses' testimony, such as Mr. Russell's, is that Monsanto was one of the first to contract with the Government to provide Agent Purple and Agent Orange. The obvious consequence of Monsanto's furnishing the specifications for those herbicides was that the Government simply took the specifications furnished by Monsanto and denominated them, Mil-H-51147 and Mil-H-51148. Those specifications were used in the contracts with all of the manufacturing Defendants.

It is further important for the Court to realize that, although Mr. Russell's deposition was taken at about the same time Judge Pratt handed down Pre-Trial Order No. 51, Judge Pratt had no knowledge of it when he entered the

Order. Therefore, there can be no question but that Russell's deposition constitutes new or after-acquired evidence.

The facts now make it clear that the United States Government simply used the Defendant chemical companies' specifications for products involving 2,4-D and 2,4,5-T. It is now clear that the Government made no effort to analyze such specifications or to test formulations for hazards, risks or efficacy. Rather, it relied upon the Defendant chemical companies to have done such testing, as well as their implied warranties that the products were safe.

The evidence is so strong on these points at the present time that Plaintiffs genuinely believe themselves entitled to summary relief on the

Government contractors Defense question, since it now seems almost conclusive that the Government did not "establish" the specifications and for the other reasons we discussed in our Supplemental Reformulation Brief. There are numerous other reasons why, as a matter of law, the Defendants cannot satisfy elements one and two.

In the final analysis, however, for the same reasons we believe that Judge Pratt erred in rendering a partial summary judgment under Rule 56(d) for the Defendants in this complex case, it would be equally unpropitious to grant summary relief, on a partial basis, on behalf of the Plaintiffs at this time. For these reasons and because we do not want to see the Court's trial date put off, we will not file such a motion.

3. With respect to element two, it

is undisputed that the product of each of the Defendants contained some amount of dioxin. As the Court can see from the contracts which were filed as part of the records in this case, the specifications did not provide for any contaminant such as "dioxin." A copy of the specifications is attached. Simply stated, with respect to Agent Orange, Agent Purple and the other herbicides which included 2,4,5-T, they provide for a formulation consisting of the combination of 2,4-D, as previously formulated and sold by the Defendants domestically, and 2,4,5-T, as previously sold and distributed by the Defendants domestically. The Government did not delve into those specifications devised by the Defendants, particularly Monsanto, and established them in different proportions, depending upon

which herbicide was involved. But the fact remains, the formulations of 2,4-D and 2,4,5-T had been made by the Defendants and used with regard to their domestic market long before the Agent Orange project and the Government simply accepted them at face value.

In view of the fact that the specifications did not expressly mandate the presence of dioxin (the defect) in the Agent Orange product, and there was present at least some dioxin in all the products, the Defendants ipso facto must fail on element two. *Johnston v. U.S.*, 568 F.Supp. 351 (U.S.D.C., D. Kan., July 18, 1983). The Court there stated:

"Like the contract specification defense, the government contract defense only applies where the injury-causing aspect of the product was mandated by the contract."

In addition, it would appear that the Defendants' violations of the provisions

of FIFRA, 7 C.F.R. Sect. 362, et seq., preclude the Defendants from being able to satisfy element two. In this connection, we are attaching as Exhibit 4 to this Brief a summary of Plaintiffs' position with respect to the application of FIFRA.

4. In addition, there are two sub-elements of the second element (manufacture of the product in conformity with the specifications):

- (a) whether the Defendants failed to conform to express or "implied requirements" (such as the implied warranty that there would be no hazardous contaminants in the product);
- (b) whether or not there was any negligence incident to the manufacturing of the product, which Plaintiffs say occurred because the Defendants not only negligently, but indeed wilfully, manufactured the product knowing that it contained a dangerous and hazardous contaminant - even though they all admit that processes were available and

which were the state-of-the-art that would have enabled them to reduce or virtually eliminate such hazards. These elements are discussed at pp. 35-39 of Plaintiffs' "Supplemental Reformulation" brief.

At the least, it is clear that the Defendants have not conclusively negated, as it is their burden to do, fact issues with respect to either one of those sub-elements.

5. What permeates, in an overriding manner, the entire Defendant-Government relationship, is the fact that the Government developed no expertise with respect to the production of 2,4,5-T or the herbicide Orange. An example of this is attached hereto and incorporated herein as Exhibit 3, being a memorandum dated January 15, 1967, prepared by the "Defense Supply Agency" of the Department of the Army. The

memorandum was prepared in connection with the Government's consideration of the Weldon Springs project, and the acting Executive Director of the Procurement Division stated, in that regard, as follows: "Because specific knowledge in production of this material (Agent Orange) does not exist within the Government, the only basis upon which Government facilities could be used to advantage is obviously through experienced contractor operations." This confirms that the Government relied upon the Defendants and other chemical companies and chemical contractors to formulate, process and provide the product.

What is important for the Court to recognize is that the extensive amount of evidence obtained to date was acquired without any direct discovery

being engaged in with respect to elements one and two. Obviously, we are of the view that direct discovery on these two elements would bear even greater fruit.

With the foregoing procedural and factual posture in mind, we proceed now to discuss the reasons why this Court should grant our motion to allow discovery with respect to elements one and two of the Government Contractors Defense.

### III.

\* \* \* \*

**APPENDIX**

**LIST OF DOCUMENTS AND EXCERPTS  
CONTAINED IN THE GOVERNMENT'S  
OPPOSITION TO CHEMICAL COMPANIES'  
MOTION FOR SUMMARY JUDGMENT BASED  
ON THE GOVERNMENT CONTRACTOR DEFENSE**

**1. EXHIBIT: 27**

**DATE:** April 1967

**AUTHOR:** Ernest R. Higgins/  
U.S. Army

**ADDRESSEE:** Commanding General/  
Army Munitions

**SUBJECT:** It is reported that "[a] variety of herbicides were procured off the shelf and shipped to VN." \*\*\* "MILLIONS OF GALLONS OF THE HERBICIDE 'ORANGE' HAVE BEEN PROVIDED, ON AN UNCLASSIFIED BASIS, BY THE DEFENSE GENERAL SUPPLY AGENCY FOR THE U.S.A.F. THE SPECIFICATIONS USED IN THE PROCUREMENTS HAVE BEEN PROVIDED BY THE MANUFACTURERS OF THE PRODUCT AND CALL FOR A 50:50 MIX OF THE N-BUTYL ESTERS OF 2,4-D AND 2,4,5-T."

**2. EXHIBIT: 4**

**DATE:** October 25, 1967

**AUTHOR:** R. B. Scott/Hercules

**ADDRESSEE:** W. E. Vanderbenter/  
Air Force

**SUBJECT:** Hercules supplies its proposed specifications for Agent Orange: "We believe these [specifications] are both practical and sufficiently rigid to be acceptable to industry and to the government agency concerned."

3. EXHIBIT: 28

DATE: June 1, 1962

AUTHOR: Keith Barrons/  
Dow

ADDRESSEE: J. R. Frank/  
U.S. Army

SUBJECT: Dow supplies its  
specifications for 2,4-D and  
2,4,5-T.

4. EXHIBIT: 5

DATE: January 30, 1968

AUTHOR: George Kampson/  
Monsanto

ADDRESSEE: Edward Bartless/  
U.S.A.F.

SUBJECT: Monsanto's proposals  
concerning the specifications for  
Agent Orange.

5. EXHIBIT: 29

DATE: January 29, 1964

AUTHOR: U.S. Army  
Laboratories

Proceedings of the  
First Defoliation  
Conference

ATTENDEES: Herbicide Manufacturers, including a number of defendants.

SUBJECT: Army turns to industry to supply a herbicide that will meet its military needs: "Ordinarily with military R & D we have a military concept that leads to the statement of a military requirement, technical characteristics, performance specifications, and other strictly delimited aspects. In this program, we do not have rigid specified characteristics. I have stated some of

the broad requirements that a successful defoliating chemical should have, but with this general framework, we will accept and use materials that will do a job for us. In a few years, it may be that we will come up with more definite specifications, but at the moment, we simply solicit the assistance of you gentlemen in finding materials that can be used successfully with the reasonably broad and general guidelines. . . ."

6. EXHIBIT: 30

DATE: May 2, 1983

DEPOSI-

TION: Cecil H. Russell/  
Monsanto

SUBJECT: Monsanto wrote the specifications for Agent Orange:  
Q. Did you create the specifications for Orange I? A. I wrote it, my version of it. Q. Well, when you say you wrote your version of it, was not your version the one that was then incorporated into MIL specs? A. They were the same."

2. Agent Orange not manufactured  
in accordance with specifications of  
Government.

The undisputed evidence before the district court and the Court of Appeals was that: (1) all of the chemical company defendants were

called upon to produce an identical product; (2) the same performance requirements applied to all of the defendant-manufacturers; (3) the presence of dioxin was determined solely by the manufacturing process; (4) the terms of the contract made no provision for a particular manufacturing process or for the presence of dioxin; (5) the government exercised no control whatsoever over the manufacturing process; (6) the defendant-manufacturers exercised absolute discretion over the manufacturing process; (7) the chemical company defendants expressly considered the presence of dioxin in their product, and unilaterally determined the levels of the contaminant; (8) the terms of the contracts provided that inspection

and quality assurance were the responsibility of the manufacturer; (9) the levels of dioxin varied substantially depending upon the manufacturer; and (10) the defendants demonstrated that the levels of dioxin in their product could have been reduced. As we agree, infra, there, therefore, arises a presumption or inference sufficient to support a finding that the product they supplied to the government was defective.<sup>15</sup> After over 200 depositions on the military contract defenses, the chemical companies failed to produce one single witness, of their own or otherwise, that the Government decision-makers was told or otherwise learned, of the presence of dioxin, the full range of its hazards, thence considered also

alternatives, and thereafter clearly made a fully informed decision to use Agent Orange as a herbicide in Vietnam. The chemical companies utterly failed to carry their burden in that regard.

3. At least a fact question existed as to whether the chemical companies knew more than the Government about the hazards of Agent Orange.

1. EXHIBIT: 33  
DATE: May 4, 1965  
AUTHOR: L. O. White/Dow  
ADDRESSEE: Internal Memo  
SUBJECT: Dow sets its own internal specifications for the level of dioxin in its 2,4,5-T.

2. EXHIBIT: 34  
DATE: June 22, 1965  
AUTHOR: Tiffany/Dow  
ADDRESSEE: Confidential  
Internal Memo  
SUBJECT: Dow establishes an analytic method for detecting 2,3,7,8-TCDD in 2,4,5-T by gas-liquid chromatography.

3. EXHIBIT: 35

**DATE:** June 24, 1965  
**AUTHOR:** U. K. Rome/Dow  
**ADDRESSEE:** Ross Mulholland/  
Dow

**SUBJECT:** Confidential letter: "As you well know, we had a serious situation in our operating plants because of contamination of 2,4,5-T with impurities, the most active of which is 2,3,7,8-TCDD. This material is exceptionally toxic. \*\*\* If it is present in the trichlorophenol, it will be carried through into the T acid and hence into formulations which are to be sole to the public. I am particularly concerned here with persons who are using the material on a repeated basis .... If this should occur, the whole 2,4,5-T industry will be hard hit and I would expect restrictive legislation, either barring the material or putting very rigid controls upon it.

4. EXHIBIT: 1  
**DATE:** March 19, 1965  
**AUTHOR:** V. K. Rowe/Dow  
**ADDRESSEE:** Several Herbicide Manufacturers Including Hercules  
**SUBJECT:** Invitation to come to Dow "to discuss toxicological problems caused by the presence of certain highly toxic impurities in

certain samples of 2,4,5-T trichlorophenos and related material." \*\*\* "Our discussions will deal only with the toxicological and analytical aspects of the problem. We will not discuss manufacturing know-how, sales or anything else not dealing with the problem of health.

5. EXHIBIT: 41

DATE: March 24, 1965  
AUTHOR: E.L. Chandler/  
Diamond Shamrock  
ADDRESSEE: Internal Memo  
SUBJECT: Following the conference referenced above, Chandler concluded: "... The purpose of this meeting ws obviously designed to help us solve this problem before outsiders confuse the issue and cause us no end of grief ...."

6. EXHIBIT: 42

DATE: July 9, 1965  
AUTHOR: J.P. Frawley/  
Hercules  
ADDRESSEE: Memo for File  
SUBJECT: Confidential notes of a telephone call concerning the acnegen problem with 2,4,5-T. "On July 9, 1965, Mr. Earl Farnham of Dow Chemical Company telephoned stating that he was calling at the request of Mr. Donald Balwin, Vice-President of Dow to inquire how serious I

considered the chloracne problem in relation to the consumer use of 2,4,5-T. \*\*\* [H]e stated that Dow had gone to great expense to alter their manufacturing conditions in order to produce 2,4,5-T acid which has less than 1 ppm acnegen. \*\*\* He then stated that Dow was extremely frightened that this situation might explode. They are aware that their competitors are marketing 2,4,5-T acid which contains alarming amounts of acnegen and if the government learns of this, the whole industry will suffer. They are particularly fearful of a congressional investigation and excessive restrictive legislation on manufacture of pesticides which might result. I advise Mr. Farnham that we shared his fear but are not aware of his allegation that the competitors' products were hazardous. He asked if Hercules had established an internal specification. I stated that he should discuss this with someone in our management....<sup>16</sup>



UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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In re

:

"AGENT ORANGE" : MDL 381

PRODUCT LIABILITY LITIGATION :

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United States Courthouse  
Brooklyn, New York

March 19, 1984  
1:00 o'clock p.m.

B e f o r e:

HONORABLE JACK B. WEINSTEIN,  
Chief U.S.D.J.

THE COURT: Sit down, please

Good afternoon, everybody.

The first item on the agenda is the discussion of the possible inclusion of the first two legs of the Government contract defense as an issue at trial.

I will be happy to hear counsel

MR. MUSSLEWHITE: Your Honor, Denton Musslewhite for plaintiffs.

As I get into this record more and more, your Honor, it has become quite apparent to me, as one in charge of this particular portion, that if anybody would be entitled to summary judgment with regard to the Government contract defense, it would be the plaintiffs for several reasons which we mentioned briefly in our brief, but which I would like to touch upon.

As Mr. Russell from Monsanto testified, it appears now that with

regard to element one, that the specifications were actually established -- as that term has been used in the cases -- by the chemical companies.

This is also indicated by the registration they made under the FIFRA act, Federal Insecticide, Fungicide and Roednicide Act.

However, as Mr. Russell testified -- first, there was a statement: I prepared the specifications and then he backed down on cross-examination and finally admitted he helped prepare them.

In any event, it appears that Monsanto was one of the first to contract with the Government provided the initial specifications which became the military specifications, were denominated in most of the contracts thereafter.

Secondly, as indicated by Mr. Hayward, Chief of Program Coordinatin of the U.S. Army Biological Lab -- and I will touch on these and Mr. Dean, imminent in the discovery, will touch on the facts in more detail -- your Honor indicated that the Government -- rather, the chemical companies were given wide range and latitude in the implementation and preparation of the specifications as to the use of the process to manufacture the product and the implementation of the contracts themselves.

As we pointed out in our formulation brief filed some weeks ago, this is an important element to the cases, to the efect that under element one, if the contract and the contract of the parties indicated that the Government contractors were given wise randge and discretion then the Government contract defense does not apply.

Thirdly, there is no question but that the Government has no expertise.

This is again indicated by Dale Bahione -- I believe that is the way he pronounces his name -- with regard to the Weldon Springs project.

He made it clear that the Government had no activity in the processing of this Agent Orange and relied on the chemical industry for that.

It is undisputed that dioxin was in all of the products and as stated in Johnston v. U.S., unless the defect in the product is expressly mandated in the specifications, the Government Contract Defense won't work.

It is our position, because it was not expressly mandated, that this product would have dioxin in it and therefore that dioxin, being a defect, the Government Contract Defense will not

work.

Lastly, we have included in the amended brief -- I won't take the time to go into detail except to say that defendants should be aware that we pled FIFRA from the beginning.

There is no point in going around about the situation.

We believe the evidence will show that they engaged in a conspiracy not to report and to comply with the express provisions of fifra and because they did not do so elements one, two, three -- all three of those elements cannot be satisfied as a matter of law.

I just made a brief summary of those particular points, your Honor, just to say this: We are not asking for any summary relief now because we want to try to assist the Court as we think it is in our benefit to go to trial when

the court scheduled the case to go to trial, but we think we are more entitled to summary relief because of their burden on the Government Contract Defense to satisfy every element and if we show, as a matter of law, that any of the elements cannot be satisfied, as a matter of law, the defense is out the window and we could probably seek relief under 56(d), but for the reasons we stated in our brief before the Court, we will not do so.

That leads me to the law with regard to why Judge Pratt was wrong in his order of May -- Pretrial Order 51, May 20, 1983, when he under and pursuant to Rule 56(d) made fact findings he deemed conclusive on elements one and two.

We believe that was erroneous because under the one claim doctrine which we went into in some detail with

the express provisions of FIFRA and because they did not do so elements one, two, three -- all three of those elements cannot be satisfied as a matter of law.

I just made a brief summary of those particular points, your Honor, just to say this: We are not asking for any summary relief now because we want to try to assist the Court as we think it is in our benefit to go to trial when the court scheduled the case to go to trial, but we think we are more entitled to summary relief because of their burden on the Government Contract Defense to satisfy every element and if we show, as a matter of law, that any of the elements cannot be satisfied, as a matter of law, the defense is out the window and we could probably seek relief under 56(d), but for the reasons we

stated in our brief before the Court, we will not do so.

That leads me to the law with regard to why Judge Pratt was wrong in his order of May -- Pretrial Order 51, May 20, 1983, when he under and pursuant to Rule 56(d) made fact findings he deemed conclusive on elements one and two.

We believe that was erroneous because under the one claim doctrine which we went into in some detail in our brief -- I don't want to take the time of the Court now to detail it -- to go through that again, except to say there are several New York Federal Court cases, three District Court cases and one Second Circuit case which indicate that if the claims are so intertwined and revolve around the same facts, that the Court simply should not grant summary relief, particularly in a

complex case like this one.

I don't want to quote all the cases but they are emphatic that this is not an appropriate case for summary relief and we believe that Judge Pratt erred in that respect; that it would be more appropriate to try all the claims together.

He himself stated, your Honor, in his pretrial order 51, and previous orders of February 24, 1982 and December 29, 1980, that the facts were intertwined.

As a matter of fact, he said elements one and two really turned on the facts to be disclosed with regard to element three.

Under our reformulation brief we filed earlier, we vehemently disagreed with that proposition.

However, we certainly agree with Judge Pratt's conclusion that the facts, the elements and issues before this Court are just hopelessly intertwined, so any type of ruling under Rule 56(d) would be inappropriate and we cited the cases for those propositions.

The Court has it before it: The Kollsman case, Taylor v. Rederi, McNellis, Toyishima, E.I. duPont and Powell v. Radkins.

The law of the case doctrine presents no problem because as Judge Learned Hand said, it is really a doctrine where the Court needs only to take a practical approach to the lawsuit and certainly, there is nothing magic about the law of the case doctrine to preclude this court from reconsidering Judge Pratt's rulings on elements one and two, just as this court considered

the rulings as to leaving out two of the defendants and they are back in the case.

There is no doctrine which would preclude the court from taking the same action with regard to elements one and two it took with regard to Thompson Chemical and Hercules.

So, in sum, your Honor, we believe this is an appropriate situation for this court to grant us relief.

The Court felt the Order had some sort of finality -- which it didn't -- even if your Honor believed that, Rule 60(b) is a perfect vehicle for this court to utilize in reconsidering and changing that prior order of Judge Pratt and pretrial order 51.

Certainly everybody will allow the Court to do this and the matters disclosed about the time of Judge

Pratt's rulings or since -- much of this was not before Judge Pratt.

We are prepared to try to reduce our discovery down to the bare bones and so have thus filed a list of 29 Government witnesses which we indicate to the Magistrate and Court we will try to take the first 12 and see if that will satisfy us.

We will make every effort to take 12 and see where we are and if there is a problem, have a meeting with the Magistrate and see if we need to go further.

In view of the situation that developed with regard to FIFRA -- and I want to thank our Law Committee for doing such a fine job in briefing that -- and upon their advice, we would like to substitute for the Secretary of Agriculture or the Custodian of Records,

with regard to the information given by the defendants, under the FIFRA Act and we believe that will justify the conclusion as a matter of law, that they are not entitled to the Government Contract Defense and may establish, per se, liability, because of the misdemeanor and felony portions of those acts. I'd like to have Mr. Dean talk a little bit about the equities and demonstrate that at least -- at least, there is a fact issue as to elements one and two and we should be entitled to submit those issues to the jury.

\* \* \* \* \*

THE COURT: As I understand it, you have two applications; one, to reverse the Magistrate's ruling with respect to discovery --

MR. DEAN: Yes, your Honor.

THE COURT: On that, denied.

I am affirming the Magistrate's ruling.

You will have no further discovery on that point. That is a separate point. You have had substantial discovery on it by your own submissions, orally and in your briefs so that you have had enough on the point to go forward. So, I will not extend any further discovery on those two legs.

MR. DEAN: Of much greater importance, your Honor --

THE COURT: The second point, as I understand it, is that you don't want to be precluded at the trial from findings on this.

That seems to me a much more serious problem and I understand it and I cannot decide it until after I hear from the other side. But you can take all the time you want.

MR. DEAN: I was just going to comment -- one argument that has been made by the plaintiffs, does not impress your Honor, and that is the argument that no matter what has been decided Monsanto and Diamond Shamrock are not bound because they never made a motion and with as much alacrity you can say they are bound --

THE COURT: I --

MR. DEAN: I don't press that.

THE COURT: Everybody is in the case and I am not going to have separate rulings on that key issue.

We are having one trial and not a series of them.

I am not interested in that technical point.

MR. DEAN: We acknowledge that it is a technical point and we do not press it.

The specifications say all supplies under this contract will be free from defect in design, material and workmanship.

Dioxin is a defect. It is the most volatile, incidious poison made. Element two is not proven and we just say, give us a chance to show it to the jury, Judge.

MAGISTRATE SCHEINDLIN: I never made a ruling as to whether or not there should be further discovery on the issue. There was no such ruling to be appealed from.

THE COURT: Then it will save us a lot of time.

Don't bother the Magistrate. We are not going to have further discovery on the point.

\* \* \* \* \*

THE COURT: No. We should

discuss it so we can help one another understand it, if we can.

That is why you are up, to help me understand the position.

Let me turn to Page 4, if I may.

The problem here is the problem of trial.

We are going to have a trial of fact that is going to have to evaluate many conflicting lines of proof in order to determine what the probabilities are with respect to a series of material propositions, however we ultimately decide the formula or how to formulate it.

Among those propositions are that this substance did cause certain problems to the plaintiffs; that the plaintiffs who are being tried here do have certain problems as a result of these substances; that they did suffer

certain damages and so on -- all by a preponderance of the evidence.

Part of the problem, both with respect to the theory of negligence; that is, that the defendants knew or should have known and didn't act in a reasonable way, as well as on the issue of liability based on some other manufacturer's theory, will be based upon what they knew and did in this case and whether they acted reasonably, even under the negligence theory, putting aside the strict liability problem.

Now, when you are dealing with that kind of series of factual problems and series of lines of proof, when you take any element or any line of proof and you say that for the purpose of this trial, this fact is established as a matter of law, you create serious problems for the fact finder because the fact finder then

has to determine that that line of proof is 100 percent proof and evaluate that line of proof as against the whole series of other lines which may have been proved to a degree less than 50 percent or more than 50 percent and so on.

We have a shifting mosaic and ultimately, we will have to make a series of very difficult decisions, something like the presumption problem.

It used to be that you could say in some jurisdictions that presumption was evidence and we have gotten away from that because a jury is not in a position to evaluate a fixed 100 percent probability against a whole series of indefinite probabilities.

So, we are dealing with a very difficult abstract and theoretical problem in fact finding.

THE COURT: So if we look at these three items on Page 4, the essential problem, it seems to me with respect to Government defense as well as contract defense, as well as with the fact of the negligence and the strict liability, too, to an extent is Item 3; that the Government knew as much as or more than the defendants about the hazard to people that accompanied the use of Agent Orange.

Now, how much did the Government know?

Well, one of the aspects of determining how much the Government knew is to look into the way that under Item 1 the Government established specifications.

If the Government didn't establish any of the specifications, but they said

to the defendants, we don't know anything about it, you established the specifications, it is a strong piece of evidence with respect to the issue of how much the Government knew or how much the defendants knew.

So shall I tell the jury in determining Item 3 that you must assume 100 percent that the Government establish the specifications and it is irrelevant that the Government may have been selecting off-the-shelf item with respect to components? Or that the defendant's participated in the discussion of specifications because they mayhave known more, or can we considera ll of that and can I let all of that in?

Or with Item 2, that the Agent Orange manufactured by the defendants met the Government specifications in all

material respects? Was one of the specifications that it not contain dioxin? Was dioxin an extraneous element? Or did the specifications have to say that you must produce this series of chemicals and there must be no dioxin in it, or you can have dioxin in it up to a certain percent? It's 94 percent pure and the impurities can be anything you want to put in it, arsenic, dioxin, anything?

What does this mean in terms of Item 3?

Now, I understand the analytical beauty of what Judge Pratt has done. And I as always admire his skill in handling these matters. but from the point of view as the trier of the facts I find it very difficult to say that Items 1 and 2 are definitely established 100 percent, and that bearing on 1 and 2 had no

relevancy with respect to 3?

As far as I am concerned, the central problem in the contract defense is Item 3. And that is going to be an essential problem with respect to negligence and probably an essential problem with respect to . . . \*

\* \* \* \* \*

THE COURT: More important than that, items one and two will have a very important bearing as factual matters on the issue of negligence and perhaps strict liability. And I don't want the negligence issue in effect resolve by my having to tell the jury this is what the Government has ordered. They ordered 98 percent pure, including in the two percent, including their dioxin, and that they met those specifications. That I will not do. And if you understand that, that is fine with me. I don't care how

you formulate the Government Contract Defense.

I am not sure you will formulate it exactly as number three indicates. I think that will have to be discussed further. But essentially the Government Contract Defense is one of knowledge.

\* \* \* \* \*

MR. KROHLEY: The point I am making is Judge Pratt made two specific factual determinations. I don't think either of those two factual determinations have a direct bearing on issue number three. And to argue to a jury issue number two is some misleading way.

THE COURT: He didn't make any factual determination.

MR. KROHLEY: He said there is no issue of fact.

THE COURT: You said there is no

issue of a fact for the purposes of trial. That is not a factual determination as far as I am concerned. He said on the basis of the information we now have and can reasonably be expected to have, the plaintiff cannot establish by a preponderance of the evidence that the Government didn't make the specifications, whatever making the specifications means, and they cannot establish by a preponderance that they didn't meet the specifications. But he didn't talk about dioxin as being within the specifications. Nor did he say that the plaintiffs couldn't establish by a lesser degree of proof when taken with all the other proof in the case by not permit the plaintiffs to show no contract, Government Contract Defense and all the other things they are going to have to show.

There has been no finding of fact on Items one and two, except in a limited way I have indicated for summary judgment. We all recognize that. Then the trial will proceed exactly as it would have if he hadn't made that decision. And the only problem is going to come when I grant your request to charge and how I frame it for the jury on who has the burden to do what.

\* \* \* \* \*

MR. MILLER: My I respectfully disagree? I think points one and two have been established because no evidence of a probative nature was put in to create a question of fact and our jurisprudence says that some issues must come to an end. And even the most excited say that everything must be hurled at the audience in every situation. And the audience in this case

being the jury.

THE COURT: I understand the position. If that is the position, I am going to set aside the granting of the motion for summary judgment to that extent. I am not going to allow that preclusion to opt in this case based on what I have heard.

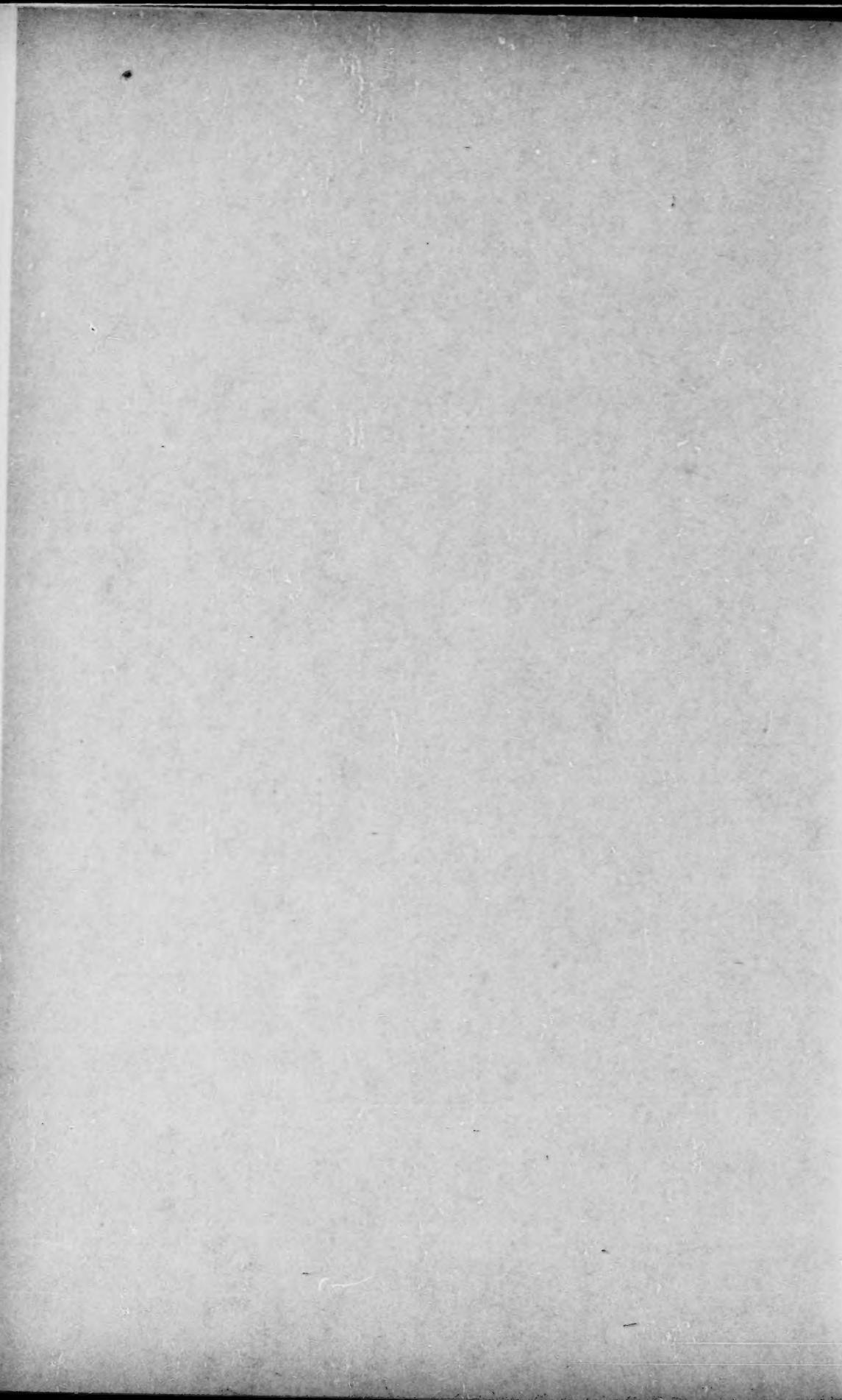
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THE COURT: We are going to at some point formulate these matters for the jury and it will help me decide what is right. But I can tell you that the evidence which is relevant on one and two seems to me is relevant on three. And one and two has not established any facts, except as I have indicated.

\* \* \* \* \*

THE COURT: I think down the line, within the next month or so, we are going to have to come to grips with

a preliminary ruling subject of course to later clarification as to how I am going to present this. I think the case is so complex that a preliminary charge would be in order. And to the extent that we can, give them some guidance from what they are supposed to be looking at as they see this mass of data which is helpful to do so. but on the other hand I don't want to get so pinned down by an opening charge or have you so pinned down that we can't during the course of four or six month trial modify the questions we are going to put to the jury based on what we are going to hear and what we later learn.



## *Appendix IV*

### **Medical Causation.**

Dioxin is the most toxic synthetic substance known to man. Dr. Marvin Legator, Professor and Director of Division of Environmental Toxicology and Epidemiology, University of Texas Medical School, stated:

Dioxin should not be considered just another toxic pollutant. In fact, it is one of the most potent chemicals known. Consider that with many potent toxic chemicals we find adverse health effects in the parts per million (ppm) range. With dioxin in animal studies cancer and reproductive effects are reported in the parts per billion (ppb) and parts per trillion (ppt) range. To gain insight as to what a ppt represents, consider a ppt as being approximately the surface of a quarter in 186.6 square miles, or 2 drops of water in 100 olympic sized swimming pools, each containing 260,000 gallons of water. Yet concentrations in this range [of dioxin] are toxic.<sup>13</sup>

Scientific literature confirms the toxicity of dioxin. See, Doc. 5400, pp. 71-144, Rec. 5400. After a review of that literature, Dr. Ellen Silbergeld of the Environment Defense Fund executed an affidavit which stated:

In my scientific opinion, these studies taken together and evaluated carefully for such considerations as dose and length of exposure, sensitivity of measurement, and power (size of study and length of follow-up), support the opinion that human exposure to Agent Orange (its constituents, 2,4,5-T and dioxin causes peripheral and central neuropathy; hepatic toxicity; including porphyria similar to porphria cutanea tarda; hyperlipidemia and hypercholesterolemia, as well as associated cardio-vascular and cardiorenal diseases; reproductive disorders including birth defects and infertility; and cancer, in addition to chloracne.

As to the ten representative plaintiffs' going to trial, according

to a brief filed by the PMC after the court had given preliminary approval to the settlement, "plaintiffs' expert witnesses, Drs. Codario, Legator, Orris, Hay and Silbergeld each intended to testify that 'Agent Orange' and its contaminant TCDD (dioxin) is (1) highly toxic and (2) carcinogenic." Doc. 4637, p. 40, Rec. 4637. Dr. Ronald Codario was prepared to attribute Michael Ryan's chloracne to his exposure to dioxin in Vietnam. Drs. Peter Orris, Alastair Hay, Allen Levin, Marvin Schneiderman and Ellen Silbergeld were all prepared to testify that Danny Ford's soft tissue sarcomas "were caused by his exposure to Agent Orange contaminated with dioxin. *Id.* at 53. Dr. Levin was prepared to testify that the representative plaintiffs'

immunologic tests were totally consistent with immune disregulation caused by exposure to dioxin. *Id.* at 58-60. Dr. Codario was prepared to testify that Michael Ryan's peripheral neuropathy was in his medical opinion related to Agent Orange exposure. *Id.* at 62-63. Dr. Peter Orris was prepared to testify that George Ewalt's neurological disorders were probably caused by his exposure to dioxin. *Id.* at 63. Dr. Peter Orris and Dr. Ronald Codario were prepared to testify that George Ewaltz's basal cell carcinoma was caused by his exposure to dioxin. *Id.* at 67. Dr. Lennart Hardell was prepared to testify, to a reasonable degree of medical certainty, that David Lambotte's lymphocytic lymphoma was caused by his exposure

to Agent Orange. *Id.* at 68 (this includes reference to the famous "hordell Study" in Sweden). After examining Danny Ford, Dr. Codario stated that it was his opinion that Mr. Ford's soft-tissue sarcoma was caused by his exposure to Agent Orange. *Id.* at 69.

In addition, Dr. Deborah Barsotti ("Reproductive dysfunction has been associated with exposure to TCDD (dioxin) in experimental animals and man as well"); Dr. K. Diane Courtney, of the E.P.A.; Dr. Maurine Hatch, Asst. Professor of the Division of Epidemiology at Columbia University; Dr. Hay; Dr. Legator; Dr. Levin and Dr. Silbergeld all were prepared to lay a proper predicate for causation of miscarriages and birth defects generally and that the

exposure of Ryan and Jordan to dioxin probably caused the miscarriages of their wives and the birth defects in their children.

.....

16. Recent epidemiological studies clearly provide epidemiological support for plaintiffs' causation case. *Ranch Hand Mortality Study* (June 1983) (JA 16649) (findings are excess of deaths from malignant neoplasms, digestive system maladies and endocrine disorders); *Ranch Hand Morabidity Study* (Feb. 1984) (JA 4418) (detected statistically significant melanotic skin cancer, minor birth defects, neonatal deaths and physical handicaps in Ranch Hand's children, subjective deficits, symptoms resembling porphyria cutanea tarda and leg pulse deficits); *Australian*

*Mortality Study* (Sept. 1984) (found Vietnam veterans die 2.06 times more than non-veterans and statistically significant excess deaths from diseases of the cardio-vascular and digestive systems); *The Texas Study* (March 1984) (JA 16740) (found statistically significant adverse effects upon immunological - suppressant system); *The New York Mortality Study* (March 1985) (JA 14913(veterans 1.44 to 1.82 times more likely to die of suicide, 1.37 to 2.25 of lung cancer, 1.36 to 2.77 of melanoma and 1.17 to 1.83 of cardio-vascular disease); *Royal Australian Commissioner* (1985) (noted Australian Mortality Report reflected that mortality rate of Vietnam veterans was statistically significant 29% higher than that of non-veterans); *Australian Birth Defects Study* (Jan. 1983) (JA 16474)

(because of 1.5 (50%) excess further study of ventricular septal defects and Down's syndrome); *Massachusetts Mortality Study* (Jan 1985) (JA 13329) (reports statistically significant elevation of deaths due to kidney cancer, stroke and connective tissue cancer); *CDC Birth Defects Study* (Aug. 1984) (JA 9409) (found statistically significant high risk of fathering a child with spine bifida, cleft lip with or without a cleft palate and other neoplasms such as Wilms tumor); and the *West Virginia Mortality Study* (Jan 1986) incidence of malignant cancers of the respiratory system and soft tissue and connective tissue cancers and neoplasms of the skin).

